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A TREATISE

ON

MARITIME LAW.

INCLUDING

THE LAW OF SHIPPING; THE LAW OF MARINE INSURANCE;
AND THE LAW AND PRACTICE OF ADMIRALTY.

BY

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IN TWO VOLUMES.

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TO

CHARLES G. LORING, ESQ.

My dear Friend,

Let me dedicate this work to you. The arduous and honorable office you now hold has taken you from your high position at the Bar, where you had all the success and distinction our profession could give. But the mercantile community (as you know, to your cost I should say, if you were not one of those who love labor) will not consent to lose the advantage of your experience, your learning, and your sagacity. And if any of the questions submitted to you lead you to open these volumes of mine, and you find there some of the cases in which, in the olden time, we met, — as opponents, but not as enemies, — you will be willing, I think, to remember how long our friendship has lasted; and you will pardon me for saying, that I have always regarded it as contributing to the honor and the happiness of my life.

THEOPHILUS PARSONS.

PREFACE.

Before I came to Cambridge, and while still engaged in the business of my profession, I had become convinced that the books in the different departments of maritime law, excellent as some of them were, were still open to the objection, that they treated severally and disconnectedly, topics which in themselves were closely connected and needed the mutual illustration they could give each other. It seemed to me that the Law of Shipping and the Law of Marine Insurance, for example, could not be learned fully and accurately excepting in their connection. How these subjects intermingle in some of their subdivisions, is obvious. Thus, no work on Shipping would leave the subject of General Average untouched; and certainly no work on Insurance could do so. But does this topic belong more properly to Shipping or to Insurance? It belongs to both; and equally to both; and connects the two together. And to go beyond this, it may be said that there is no topic of either of these systems of law, which can be treated of with any fulness, without a frequent reference, more or less direct, to the same topic as it stands in the other of those systems.

Moreover, the appropriate and specific law of remedy

or enforcement for all maritime matters, is the Law of Admiralty. And, waiving for the present, the question whether a policy of insurance is within the jurisdiction of American Admiralty, Salvage, which is equally important in Shipping and in Insurance, and is another of those links which unite them, belongs almost exclusively to Admiralty. And the whole subject of maritime liens, as distinct from common law liens, is, in a good degree, and ought to be, I think, in a far greater degree, committed to the charge of Admiralty, and governed by the principles and enforced by the processes of Admiralty courts.

But without attempting to illustrate, by further details, my reasons for believing that these topics are interdependent branches from one great stem — the science of Maritime Law — it is enough to say that eight years ago I began this book, for these reasons; and that it ought to be, as a whole, and in all its parts, an illustration of them.

I am not, however, willing to admit that the faults of this work indicate a mistake in my theory. Great difficulties in the execution of my purpose arose from the fact, that these topics had been heretofore regarded as in so great a degree isolated and independent. And I cannot but think that there are important defects and mischievous uncertainties in the maritime law of England and of this country, at this day, which would never have existed, had the various relations, rights, obligations, and remedies which belong to it, been usually regarded as parts of one whole. For example, the law of the sale of distant ships and cargoes and the law of abandonment

would not, I think, and the law of lien on ships and cargoes would not, I am certain, have been in that case, what they are now.

I add, that by adhering to my plan of putting very few cases in the text, but making that, as far as I could, a connected and logical statement of all the principles and rules of the law, and placing in the notes the authorities on which they rest with such citations as seem to afford needed illustration, or due qualification, I have succeeded in compressing my work within these two volumes.

Long ago I had become satisfied, that the boundless affluence of existing legal authority, and the rapid increase of the reports of English and American courts, and of other repositories of the law, made it with every passing year, more difficult for a lawyer to possess the means of a thorough investigation, and impossible for him to give the time and labor necessary for such investigation, to the many questions which arise in practice. I was further convinced, that books might be made in which this labor of investigation should be so thoroughly performed, and the results so given in the text, and the authorization and illustration so put forth in the notes, as in most cases to render further research unnecessary, and to make it much easier when necessary. It is this book that I have endeavored to make. The difficulty of accomplishing such a work was obvious; but it did not seem impossible. I knew that it could not be made without the command of a completed library, and that I have here; and an accumulation and consolidation of the results of a very large amount of intelligent labor, and for this purpose I have

added to my own efforts the resources of skilful and zealous industry within my reach. But while I believe that none of the sources of our law have been left unexplored, I dare not hope that I have found every thing of value. The materials thus gathered by me and for me, I have worked over, again and yet again, with unfailing patience at least, whether with success or not. For it has been my single purpose, by the most careful and vigilant elaboration of text and notes, to make as useful a book as I could; that is, one which should be, on the one hand, complete, and on the other trustworthy. I now give this book to the profession, lamenting its defects, and fearing that it has faults which I do not discern; but believing that I have a right to think that they are not caused by any want of earnest and unremitting endeavor on my own part, to make every page, and every part of every page, as good as I am able to make it.

Of those who aided me most about my previous works, I have spoken in the prefaces to them. I have received valuable assistance in the present work from many persons. I must indulge myself with mentioning particularly, John Lathrop, Esq., of Boston, whose learning and intelligence and faithful industry, and capacity for exhaustive investigation, must soon give him a high place in his profession.

In the Appendix to the first volume will be found a complete collection of all the mercantile statutes and statutory provisions of the United States, together with the pilotage laws of New York and Boston (which may at least serve as a sample of all), and the rules for the navigation of steamers prepared by the Commissioners of the

United States. If I may judge at all by my own wants in years past, such a collection may be of great use to the practical lawyer.

In the Appendix to the second volume, will be found such forms, whether of contract or of practice, as seemed to me most desirable.

T. P.

Harvard University; Dane Law School.

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BOOK I.

ON THE LAW OF SHIPPING.

A TREATISE

ON THE

LAW OF MARITIME PROPERTY AND CONTRACTS.

CHAPTER I.

ON THE HISTORY AND ORIGIN OF THE LAW OF SHIPPING.

SECTION I.

OF THE PRINCIPAL FOREIGN CODES AND WRITERS WHICH TREAT OF THIS LAW.

While the common law of England was acquiring form and authority, the commerce of England was much less than that of some other of the states of Europe; and, in comparison with that of the same country in recent times, was slight and unimportant. Hence the principles of the common law are not adequate nor always applicable to the present exigencies of commerce.

There are occasional intimations, in even the oldest books of the law, that England had then shipping and merchants, and that questions in relation to ships came sometimes before the courts. Even in those ages, the usage of merchants was evidently — and sometimes expressly — referred to as a guide, if not a master, in cases of this kind. As, with the growing commerce

of England, these questions grew more frequent, more diversified, and more important, this usage was referred to more and more constantly, and perhaps with increasing deference, until, out of this usage, or rather in conformity with it, but yet importantly modified by those rules of law with which the courts were most familiar, the law merchant of England gradually acquired force and authority. Sometimes it is said to have grown up alongside of the common law. But, in fact, it was adopted step by step, as an integral part of the common law; and the flexibility of that system, and the vital force with which, as a living thing, it yielded to the new influences and supplied the new wants presented by successive changes in the condition of the people, are well illustrated by the way in which the law merchant became, to a very great extent, a part of the common law, and as such came over to this country, and is our law as it is that of England.

As this mercantile law was formed under the modifying, though not controlling, influence of the common law, so, on the other hand, it exerted a reciprocal influence upon the common law, through nearly all branches of the law of contracts. Thus the rules respecting sales, agency, parties, consideration, assent, and construction generally, all exhibit the clearest indications that the customs of merchants have produced important modifications of them. But the law of shipping, the law of marine insurance, and the law of negotiable paper, may be regarded as the principal topics which belong in an especial manner to the law merchant. They may be said to have had no other origin than the custom of merchants. The common law yielded somewhat slowly and reluctantly to their demands; and even when it adopted them, insisted upon the application of its own principles. In some instances these were retained and enforced, when they were incongruous, and incompatible with those customs; and sometimes the law merchant has suffered detriment from this cause, which has not, perhaps, wholly ceased to operate in England, or even in this country.

By the custom of merchants, which is thus regarded as the parent of the law merchant, is not meant merely the custom of English merchants at the time the English courts first took cognizance of them; and not merely the custom of English or American merchants at different periods from the beginning of

the law merchant of England to the present day. For, if this were the case, we should have no other sources of authority for this custom, or for the rules derivable from it, especially in its earliest periods, than the brief and unfrequent cases in the early English reports in which questions of this kind are considered.

The common law has its old books of authority; and they are numerous and excellent; Statham, Fitzherbert, Glanville, Brooke, in the sixteenth century, and in the next, Bracton, Fleta, Britton, Rolle, Sheppard, and — at the head, perhaps, of all — Coke, give not only to the antiquarian, but to the student, for present and practical purposes, needed and trustworthy information. To these we may add the reports of adjudged cases, which exhibit with the utmost clearness the history of the law for six centuries. But, in the treatises and digests above enumerated, we find little that can indicate more than the existence of a law merchant, or of the custom of merchants. And, although the earlier reports are not quite so barren in this respect, the notices they give of the law merchant are scanty, and of comparatively little value.

We are not, however, destitute of authority and precedent for the earlier, and, as they may well be called, the fundamental rules, of this great branch of the law. Indeed, this authority ascends to a far remoter antiquity; and the books, to which we must refer for it, have two other important advantages over their brethren of the common law. One of them is, that they give us the rules, not of one people or country, but of the commercial world, and therefore they are more free from local and partial causes of error or limitation. The other is, that, founded as they were upon the experience, the necessities, and the usages of the merchants generally of the then civilized world, they are characterized by a profound rationality and an exact justice, which are seldom, if ever, materially affected by the rights or prejudices of caste or class, or by that devotion to, and perpetual consideration of war with, one's neighbors, which was the soul of the feudal system, and, through that system, necessarily influenced and injured the whole body of municipal law in all feudal nations.

These books retain at this day their utility, if not their authority. And no lawyer should consider himself *safe* in his knowledge of the law merchant, who has not studied them, at the very least,

enough to enable him to make use of them when professional exigencies require him to do so. These books are, those of the Roman civil law, the Consolato del Mare, the Laws of Oleron, the Laws of Wisbuy, Le Guidon, the Marine Ordonnance of Louis XIV., with the Commentaries of Valin, and the principal treatises on this branch of the law by Pothier and other eminent writers of continental Europe.

It is true that neither the civil law nor either of these earlier codes treats of negotiable paper;[1] for that was a later invention. But it is also true, that the laws of continental Europe in relation to bills and notes are of much and growing importance and utility in the investigation of the questions presented under our own law in reference to those instruments; and these European systems are based upon the civil law, and qualified by it, at least as much as our own law is by the common law.

A similar remark may be made of insurance; excepting that, as the law of marine insurance is obviously dependent upon the law of shipping, as, for example, in questions of wreck, jettison, average, and contribution, and maritime contracts generally, we may learn much that is now useful, not to say indispensable, for the understanding and application of the existing rules of insurance law from those earliest sources.

When we come to the law of shipping itself, we find at once that the present rules and principles, some even of those which might seem to be most peculiar, ascend to a higher antiquity than any thing in the common law, or in any other existing system of law. Even the Roman civil law, in the rubric de lege Rhodia de jactu, (Dig. 14, 2,) quotes and confirms the law of Rhodes concerning jettison. It would seem that this island possessed a flourishing commerce, at least a thousand years before the Christian era; that a system of law was there in force, which won a general acceptance in those ages, and was itself probably founded upon their established usages. Of this system we have preserved, certainly, only the fragment contained in the above cited rubric; for the collection of maritime laws which may be found in the commentary of Vinnius, under the name of the Rhodian Laws, is undoubtedly a later compilation. But in this fragment we have the modern law of jettison, average, and con-

[1] But see on this subject, Domat, Cushing's edition, sect. 1200.

tribution, as distinctly stated as in any recent text-book. It is in these words: "Lege Rhodia cavetur, ut si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est." And the whole title of the Digest about this rule is wise and instructive.

There are, however, many other rubrics of the civil law which relate to shipping, and are not traceable to any earlier origin. The rubric immediately preceding that just quoted, is, "De Exercitoria actione," of which the general purpose is to make the ship-owner responsible for the acts of the master of the ship.

The rubric, "Nautæ, caupones, stabularii, ut recepta restituant," (Dig. 4, 9,) provides that mariners, (limited, however, in the title to the master of the ship,) and the keepers of inns and stables, should be responsible for property committed to their charge. And this is confirmed in the rubric, "Furti adversus nautas, caupones, stabularios." Dig. 47, 5.

The rubric, "De nautico fœnore," (Dig. 22, 2, Code, 4, 33,) gives us the present rules which regulate loans on bottomry and respondentia.

In the rubric "de Incendio, ruina, naufragio, rate, nave expugnata," (Dig. 47, 9,) it is provided that fourfold damages should be paid by the plunderer of a vessel in distress.

In these rubrics there are provisions applicable especially to ships, and to those who own or navigate ships. And it should be added also, that, upon some other topics of deep interest in the law merchant, as payment, and imputation (or, as we term it, appropriation) of payment, carriage of goods, novation, loans, and hiring of money, pledge, partnership, and finally the great topic of sales, the civil law is full of most profitable instruction.

It is perhaps to be regretted that the study of this system of law, which certainly deserves, if ever any system of law did, the proud title of "ratio scripta," is not more extensively pursued in this country. In England there was, formerly at least, a positive hostility to it; and it lingers there still, and may have come over to this country, and still exert some influence. If this were the proper place, it might not be difficult to show that it is at least questionable whether the common law doctrine of sales, — which, upon the central question, when and how the property or ownership in the thing sold passes from the seller to the buyer, is in direct antagonism with the civil law, — is quite so well

adapted to mercantile purposes; and whether, even now, a more extensive use of the civil law distinction between the *jus ad rem* and the *jus in re* would not assist in determining questions which must still be regarded as unsettled. If we do not mistake, there are some indications that the courts and the profession are beginning to find that the common law, which is ours by inheritance, may be usefully illustrated at least, and, possibly, qualified, by principles drawn from the Roman civil law.

Students are often deterred from any examination of the civil law, by a belief that useful knowledge of it cannot be acquired, without the expenditure of a vast amount of time and labor. But this is a mistake. A thorough knowledge of all its principles cannot be acquired by less than a life of labor. This, however, is not necessary; and the orderly arrangement of this law, the exactness and clearness of its phraseology, the complete and well adapted apparatus for its study, which now exist, and the excellent introductions to it, which have been published in our language, enable a student in his hours of collateral study alone, to learn much of its history and general character, and of the order in which its topics are presented, and of the manner in which the principal books of reference to this law are constructed. Having learnt this, he will find no difficulty in afterwards examining fully any question which may arise in his study or practice; and we are persuaded that no lawyer who shall pursue this course will afterwards find reason to believe that the hours thus employed were wasted. "It is most certain," says Dr. Strahan, in his preface to his translation of Domat, "that it is in the body of the civil law that we have the most complete, if not the only collection, of the rules of natural reason and equity, which are to govern the actions of mankind." This is high praise; but even if it be deserved, the advice of Chancellor D'Aguesseau to his son may not be the less necessary. He wishes him "to distinguish for himself that which belongs to natural and immutable justice from that which is only the work of a positive and arbitrary will; to avoid being dazzled by the subtilties which are frequently diffused in the Roman jurisconsults; and to draw with safety from their treasury of reason and common sense."

The Consolato del Mare is a code of maritime law of great antiquity and equal celebrity. But it is not open to the English

student, as no translation into our language, excepting of a few chapters, has ever been published. The origin of this code is not certainly known; neither the names of its authors, nor the time nor the place of its earliest promulgation, can now be ascertained. It was first printed, however, somewhere in the fourteenth century, but is supposed to have been in force and in general use for a considerable time before. And, indeed, we consider the most reasonable theory of its origin to be that which regards it as a gradual collection, or digest of all the principal rules and usages established among commercial nations from the twelfth to the fourteenth century. Very many topics of maritime law are treated of in it, and various commercial regulations have been added in the editions which have appeared, from time to time, in Europe. It may be referred to profitably, in relation to the ownership of ships, and the rights and the obligations thereto; to the rights and responsibilities of master and seaman; to the law of freight, of equipment and supply, of jettison and average, of salvage, of ransom, and especially to the law of prize, in regard to which it has of late years exercised an important authority. The best edition by far, and by common consent, is that of Pardessus, in his Collection of Maritime Laws. We are in hopes that an English translation from this edition will soon be made and published in this country.

Next to the Consolato in time, or, perhaps, — for this is disputed, — before it, come the Laws of Oleron. We know that these were collected, or at all events promulgated and published, as the rules then in force for the regulation of shipping, in the small island of Oleron, off the coast of France. The French claim that Queen Eleanor, who was Duchess of the province of Guienne, near which Oleron lies, authorized and caused their publication; the English say that her son, Richard I., did this. The only thing certain is, that no one knows who their author was; but they were undoubtedly first established somewhere in the twelfth century. This code has been repeatedly published in English, and is most accessible to American students in the Appendix to the first volume of Peters' Admiralty Reports. Their value to the student of the law of shipping may be inferred from an enumeration of the principal topics. These are the navigation and sale of a ship, the duties and the rights of

master and mariners, wreck, freight, salvage, jettison, injuries to cargo, quarrels on board ships, collision, anchorage, supplies and repairs, the intentional stranding of a ship, pilots, partnership in vessels, and goods taken from wrecked ships.

The next code of which we shall speak is that known as "The Laws of Wisbuy." The exact date of these also is uncertain; and by some they are supposed to be older than the Laws of Oleron. The weight of authority is, however, that they were founded upon the Laws of Oleron, and were only modified so far as to make them better adapted to the usages or the wants of the commercial states or cities of northern Europe; and that the code was published about the twelfth or thirteenth century, immediately after the Laws of Oleron. Wisbuy was a convenient port on the north-western coast of Gott-land, an island in the Baltic, about equally distant from Sweden, Russia, and Germany. These laws, its former celebrity, and the works of art and luxury now found among its ruins, indicate that this city was the emporium of a great trade; although there is nothing in its position, and nothing preserved in its history, which explains either this or the rapid and total decay of its prosperity. Some historians, however, attribute its decline and destruction to dissensions and conflicts among its own citizens; and if they existed and endured, they would have been, indeed, a sufficient cause for swift and utter ruin.

This code covered a wide ground, embracing most of the topics of the law of shipping; but it is concise and sententious and very brief, occupying but a few pages in the Appendix to Peters' Admiralty Reports; and a cursory examination shows a coincidence with the Laws of Oleron quite too uniform to be casual.

The sixty-sixth section of the laws of Wisbuy has given rise to a curious question. It is in these words: "If the merchant obliges the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea." Here is a distinct recognition of the contract of insurance; and in terms which imply that it was familiarly known to mercantile persons. It follows, therefore, either that the Laws of Wisbuy are a much later work than is commonly supposed, — and against this theory the internal as well as the external evidence is very strong, — or that this section is an interpolation of later

date, which is perhaps the prevailing opinion; — or that marine insurance and life insurance existed, and were common, centuries earlier than is commonly supposed. It is not the place here to go into a critical examination of this question; but we confess a strong disposition to adopt this last view, which seems to us supported by facts as well as arguments, and for which we have the high authority of Emerigon.

Sometime in the sixteenth century, there was published a French work, commonly known by the name of "Le Guidon," of which the whole title is "Le guidon utile et necessaire pour ceux qui font merchandise et qui mettent a la mer." This work was highly praised, as well as published and illustrated, by Cleirac, about a century after its first appearance, and is not unfrequently cited by writers on maritime law. But it relates mainly to bottomry and insurance, and, though there is some reference to other topics of the law of shipping, they are not presented with much fulness, and the work is of less value than those previously mentioned.

At length we reach the Ordonnance de la Marine of Louis XIV., published in 1681. Our own Kent calls this "a monument of the wisdom of his reign, far more durable and more glorious than all the military trophies won by the valor of his armies." It covers the whole ground of maritime law, including insurance; enacting with clearness and perspicuity all the provisions then in force, whether derived from the sources above enumerated, from a more general tradition, from previous enactments, or from usage. These it arranges in an excellent order; and displays a learning and ability in those who prepared it which forbids the supposition that they were mere compilers. But, strange to say, the authors of this ordinance are wholly unknown. This, also, is inserted in the Appendix to Peters' Admiralty Reports.

Almost a century after this ordinance appeared, Valin published his Commentary upon it. This admirable work acquired at once celebrity and authority, and is now oftener referred to in this country than any foreign work on maritime law. It was not, like Coke's Commentary on Littleton, a vast and ill-arranged mass of learning, that utterly submerged the treatise which it proposed to illustrate. But, while doing full justice to the ordinance, not only admitting its excellence in general, but

exhibiting it clearly in detail, it is itself a work of the greatest utility, and of the highest authority.

We might now enumerate a long list of commentators and jurisconsults who have written, in some instances, for the purpose of illustrating the above-mentioned codes or laws, but more frequently, independent works of their own. The catalogue of names would, however, be of little use, unless we could present at least a general view of the particular merits of each one; and this would require far more space and far more labor than we could give to it. It may, however, be of some assistance to the student, if we mention the names of a few of the most important, and describe their writings briefly.

We begin with Cleirac, a French author, who published, in 1647, at Bordeaux, a volume entitled "Us et coutumes de la mer" — (Usages and Customs of the Sea). It is divided into three parts, which upon the title-page are called, 1st. Of navigation. 2d. Of naval commerce and maritime contracts. 3d. Of the jurisdiction of the marine. In fact, however, the first part, containing 212 pages, consists of the Laws of Oleron, the Laws of Wisbuy, and the Ordinances of the Hanse towns, determined at Lubeck in 1597. The second part contains Le Guidon, in twenty chapters, of which we have already spoken. To this are added certain formularies or rules upon some of these subjects, which were in force in Antwerp and Amsterdam. The third consists of various ordinances of the governments of France, Spain, and the Netherlands, concerning the jurisdiction of the admiralty. All of these, however, and especially Le Guidon in the second part, are accompanied by very valuable notes and comments, making the whole book a complete and most trustworthy exhibition of the whole maritime law of that age.

In 1655, Roccus, a Neapolitan jurisconsult and lawyer, published a large work on maritime law, from which was taken and compiled a smaller work, published in Amsterdam in 1708, entitled "De Navibus et Naulo, item de assecurationibus, notabilia" (of ships and freight, and of insurance). This is a learned, very able, and, at this day, very useful work. It does not purport, like Cleirac's volume, to be a reprint or compilation of any previously existing works. But it gives the whole law merchant of that day, as it was known to a lawyer of full practice and high authority. The orderly arrangement of the topics,

and the directness and simplicity with which they are treated, make a reference to this book, and the use of it, very easy. Each of the "Notabilia" contains a distinct statement of some rule or principle, followed by citations of authorities. Most of them are very brief, few covering so much as a page. An excellent summary at the beginning of the first part, of ships and freight, and another at the beginning of the second part, assurance, enables a student to turn readily to the precise thing he wishes to see. To these two parts are added select answers and arguments of Roccus in actual cases. We find this work more frequently referred to than the former; they are, however, very different, and neither supersedes the other.

Passing over a century, we come to another Italian legist, Casaregis; who, after many years of full practice in mercantile cases, received the appointment of judge in the high courts of Tuscany, and held it for twenty years. His works were published after his death in four volumes, folio. The first two of these consist of two hundred and twenty-six "Discursus Legales," which cover the whole ground of commercial law, including insurance, the law of shipping, partnership, and exchange. The third volume contains an edition of the Consolato del Mare, with an ample commentary. The fourth volume is usually bound up with the third, both together being only about as large as either of the others. This last volume does not treat of commercial law, but of successions, and other analogous topics. Casaregis is a far more voluminous author than either of the preceding; and his matter is not so well arranged; certainly not so well for the mere convenience of the student. But his volumes contain a treasury of the law merchant. Scarcely any topic is omitted; and many curious questions seem to have been anticipated, and are illustrated with the combined light of learning and genius. Story said of him, "I cannot say much about this book from my own knowledge, for I have only referred to it occasionally. But rarely have I looked into his works upon any contested question, without being instructed and enlightened by the perusal." And Valin has declared emphatically, that Casaregis is incontestably the best of all maritime authors.

We close this list with the name of Pothier; in some respects the greatest name of all. Born in 1699; at the age of fifty, after he had acquired the highest reputation as a jurisconsult, he

accepted the office of Professor of Law in the University of Orleans, to which he was appointed by D'Aguesseau. A year before, he had begun the publication of the Pandects. In the two centuries which have followed, there have been celebrated civilians, whose almost boundless knowledge may have surpassed Pothier. But the common consent of those of the English and American judges and lawyers, who have sought the aid of the civil law in deciding questions of the present day, has given to Pothier the credit of being the most useful and the most trustworthy of civilians.

He was for some years employed in completing his edition of the Pandects. And then he poured forth in rapid succession a series of treatises upon a great variety of subjects, in which the student will find all that the most complete acquaintance with the civil law could give, but qualified, illustrated, and made thoroughly practical by an equal knowledge of the actual law of his time, and, yet more, by the clearest view of the great and abiding principles of truth and justice and order, of which the rules of law must be the exponents, or be erroneous and perishable. Of these treatises, those which refer especially to commercial law, are, on obligations, in 1761; of the contracts of sale, in 1762; of bills of exchange, in 1763; of hiring, in 1764; with a supplement to this latter, in 1765, which treats of maritime hiring, and of partnership. Of the treatise on obligations, an English translation by Martin was published in 1802, and a better one by Evans, in 1806; this last has been republished in this country several times. The treatise on maritime hiring has been translated by Caleb Cushing, in 1821, and that on the contract of sale, by L. S. Cushing, in 1839. Both of these translations are excellent, and the books are in common use.

Sir William Jones, in a passage in which he claims the credit of introducing Pothier to the acquaintance of his countrymen, and regards this alone as discharging his debt to the profession, says: "I seize with pleasure an opportunity of recommending Pothier's admirable treatises on all the different species of express or implied contracts to the English lawyer; exhorting him to read them again and again."[1]

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[1] See Jones on Bailments, p. 29. In the case of Hoare *v.* Cazenove, 16 East, 398, Lord Ellenborough, in a decision in which he cites several continental writers who are

It is undoubtedly true, that the books above mentioned are wholly unknown to the great body of the profession in this country, and to many of those who stand in its front ranks. But it is quite as certain that some of those who have attained the very highest position, and who have been most useful, and have done for the law of their country a good, a great, and a permanent work, have studied these books, and from these ancient and abounding sources have drawn the principles and arguments, the rules and the reason, which have enabled them to strengthen the foundations of the jurisprudence of their countries, or incorporate in the superstructure that which will never be taken away.

To speak only of the dead, and of two only of them. In 1756, Mansfield took his place upon the bench of England. Then, her commercial jurisprudence began to acquire form and regularity. He had the sagacity to see that the technical rules, and indeed the principles, of the common law, were not sufficient for the growing exigencies of British commerce. And he had the greatness to leave his own peculiar ground, and go where he could find the resources which he needed.

He brought to the commercial law of England three distinct

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in conflict with each other, coincides with Pothier, and says that he is "a most learned and eminent writer upon every subject connected with the law of contracts, and intimately acquainted with the law merchant in particular." In the case of Cox *v.* Troy, 5 B. & Ald. 474, relating to the law of bills of exchange, *Abbott*, C. J., and *Holroyd*, J., speak of Pothier as of very high authority, and *Best*, J., says, "The authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country." And closes additional remarks in his praise, by saying, "His writings have been constantly referred to by the courts." . . . . "We cannot, therefore, have a better guide than Pothier on this subject." Byles, in the preface to his excellent work on bills and notes, says that Pothier "evinces a profound acquaintance with the principles of jurisprudence, and extraordinary acumen and sagacity in their application; the result of the laborious exercise of his talents on the Roman law." He adds, "There cannot be a greater proof of the surpassing merit of his works, than that, after the lapse of more than half a century, and a stupendous revolution in all the institutions of his country, many parts of his writings have been incorporated, word for word, in the new Code of France. The *Traité du Contrat de Change* is often cited in the English courts of law." For the estimation in which he is held in this country, I can only refer to the very frequent reference to him, not only in numerous cases, but by all our writers who look at all to civilians and writers of continental Europe. In some of Story's works, for example, we find note after note repeating Pothier's name, through many successive pages; and frequently with expressions of the highest commendation.

elements. One of these was his own accurate and profound knowledge of the common law. Another was the usage of merchants, which he openly adopted as a guide, and endeavored to ascertain, as well by personal inquiries among them, as by special juries composed of them, and by examination of merchants as witnesses. But he added also yet a third, and it was a diligent study and a careful consideration of those old codes and writers that we have enumerated. In Scotland, the civil law is the basis of the municipal law, as the common law is in England. Murray, afterwards Lord Mansfield, was a Scotchman, and received a Scotch education, and thus became an excellent civilian. And the use he made of this knowledge was never obtruded, but never concealed. In one case, Luke *v.* Lyde, 2 Burr. 882, where the important question of freight *pro rata* was for the first time fully considered in an English court, he cited, from the Pandects, the laws of Rhodes, — calling them "the ancientest laws in the world," — the Consolato del Mare, the Laws of Oleron, from Cleirac's Us et Coustumes de la mer, the Laws of Wisbuy, and Roccus de Navibus et naulo, and the Ordinance of the Marine of Louis XIV. Thus, in this one case, referring to nearly all those works which we have enumerated. Marshall, in his book on insurance, exhibits Mansfield as almost the creator of the law of insurance for England, and supposes him to have drawn much of his knowledge on this subject from the ordinance of Louis, and the commentary of Valin.

I have already mentioned the name of our own Story. Placed in early life upon the bench of the supreme court of the nation, it was his fortune to be called upon to exercise the judicial functions in the infancy of our national jurisprudence. One great question met him at the beginning: what is the admiralty jurisdiction secured to the courts of the United States by the constitution. Many, and probably a great majority, of the lawyers of this country, had no other idea of it than that which the shattered and fettered admiralty of England could give them. And, judging from all human probability, we have some right to say, that, if Story had not at that time held that place of high authority, the present admiralty jurisdiction of England would have been ours at this moment.

None can deny that it was he who settled this question; and he was obliged to maintain his ground against obloquy and

reproach which might well have shaken any man. But the great and admitted utility of the free and wide admiralty jurisdiction, actually established among us, may induce an opinion that if Story had not taken that ground, and if, at his day, and at the beginning, this question had been decided otherwise, this same jurisdiction would have vindicated itself, and by some other instrumentality been restored to the fair proportions of which it was curtailed in England in a succession of ages, by the attacks of rival and victorious courts. The answer is, that it was only by the greatest effort and the greatest firmness that the difficult work of restoring the admiralty system to its original extent and vigor was then accomplished. If it had been delayed, this work would have been with every added year more difficult, until it became impossible. And it is to be remembered that the profession would not then have had the opportunity of judging by experience of the utility and safety of this jurisdiction.

Story could not find all the true and original principles of admiralty, or of the law of shipping, in English law. He followed the lead of Mansfield, and went where they could be found; went to continental Europe; to the successive codes which in successive ages have defined that jurisdiction and built up that law, and to the many learned men who have illustrated both. But he went with a freer step than Mansfield, and a still wider research brought to him, on every point of the law merchant, still greater and more constant assistance. Story's fame does not need exaggeration nor concealment. If it be admitted that his vast and various official duties and personal undertakings, and the very extent of his inquiries, necessarily resulted in much knowledge that was only superficial, and some opinions that were erroneous, it will still always remain true, that to his sagacity, his firmness, his industry, his learning, and though last, not perhaps least, to the beautiful amenity and charming courtesy of his personal demeanor and the universal kindness which helped him so much in the many conflicts he was obliged to sustain, this country is very largely indebted for its admirable system of commercial law and commercial jurisprudence.

SECTION II.

OF THE ENGLISH ADJUDICATION WHICH CREATED OR DEFINED THIS LAW.

It has been already intimated that the common law has welcomed and adopted the law merchant; at least, to a certain extent. It is instructive to observe the successive steps of this progress. Indeed, at the beginning, or in the early ages of the common law, the "customs of merchants" appear to have had almost a greater respect paid to them, and a more positive authority allowed them, than in later times. And this, if it be a fact, may be explained in part by the want of that power and that rigidity in the common law which came with age, and its accumulation of precedents, and its observance of technicalities; and in part by the infrequency of questions of a commercial nature, and the apparent absence of danger, even if the few which came up were permitted to be decided by a law of their own. In Magna Charta itself (1215), the forty-seventh section[1] runs thus, "All merchants shall have safe and secure conduct to go out of and to come into England and to stay there, and to pass as well by land as by water, *to buy and sell by the ancient and allowed customs*, without any heavy tolls, except in time of war, or when they shall be of any nation at war with us." And the next section defines the rights of alien merchants in war time.

In subsequent reigns, especially those of the Edwards, various statutes were passed, expressly "de mercatoribus," securing to them valuable privileges. At a later period, a question arose whether the "custom of merchants" was to be pleaded as a custom of certain places, or to be regarded as a part of the general law, of which the courts would of themselves take cognizance. In Peirson *v.* Pounteys, Yelverton, 135 (1609), the court say, "the judges ought to take notice of that which is used amongst merchants for the maintenance of traffic."

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[1] Forty-seventh in Professor Bowen's excellent edition, but usually cited as the thirtieth.

And in Vanheath *v.* Turner, Winch's Rep. 24 (1622), Chief Justice *Hobart* declared that "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice;" and he added, "and if any doubt arise to them about their custom, they may send for the merchants to know their custom." And Coke, 1 Inst. 182 a, says that "the lex mercatoria is part of the laws of this realm;" and in 2 Inst. 58, in commenting upon Magna Charta, he uses similar language.

There also arose another question; it was, whether the custom of merchants applied to mercantile contracts between any parties, or only to contracts between merchants. At first, the latter view seemed to be held, as in Oaste *v.* Taylor, Cro. Jac. 306, (1613,) where a drawee of a bill was sued on his acceptance, and it was held that the declaration was insufficient, because it was not alleged therein that the defendant was a merchant at the time of the acceptance.

A similar doctrine was maintained in Eaglechildes case, reported in Hetley, 167. This occurred in 1632; but in 1634, in Barnaby *v.* Rigalt, Cro. Car. 301, where the defendant was called a merchant, it was held that the court would intend that he was a merchant at the time. And in 1666, in Woodward *v.* Rowe, 2 Keble, 105, and afterwards, page 132, it was distinctly held, that the custom of merchants was a part of the law of the land, that it attached to the contract, which was a bill of exchange, and that "the custom is good enough generally for any man without naming him merchant."

Two years afterwards, in an anonymous case, in Hardres, 485, (in 1668,) which seems to have been very carefully considered, being declared by the court to be "of weight and concern for the future," it was held that a reference to the custom of the realm in the declaration was unnecessary, the Chief Baron adding, "it were worth while to inquire what the course has been amongst merchants, ... for although we must take notice in general of the law of merchants, yet all their customs we cannot know but by information." It would seem, from these words, that the court would ask merchants to tell them the law; and this again might appear so inconsistent with the duty and the position of the court, that it would be supposed that mer-

chants testified only as to the facts for the jury. But in 1649, in Pickering *v.* Barkley, Style, 132, where to covenant on a charter-party containing the exception "perils of the sea," the defendant pleaded capture by pirates, and the plaintiff demurred bringing up the special question of law, whether this was a peril of the sea. "The court desired to have Granly, the master of the Trinity House, and other sufficient merchants, brought into the court, to satisfy the court *viva voce*." And on this evidence and sundry certificates, the court decided the law against the demurrer, and in favor of the defendants.

It is very remarkable how long it continued to be made a question in the courts, whether the lex mercatoria, or custom of merchants, was a part of the law of the land, or only a special custom or usage, which affected only those persons, or those agreements, that were alleged, and could be proved to be within it. For many years, and indeed ages, the profession seems to have resisted the doctrine, that it was a part of the general law of the realm; but this was held by the courts uniformly and emphatically.

Twenty-two years after the case in Hardres (1689), there was a demurrer in Carter *v.* Downish, 1 Shower, 127, which raised precisely this question, and again it was held that "all this law of merchants is part of the law of the land, and the judges are obliged to take notice of it, as well as of any other law." *Ventris*, one of the justices, said, "You here depend on the law of merchants, which at present, I think, we ought to take notice of." The uncertainty implied in the words "at present," is nearer to a doubt on this subject on the part of the court than we find in any other case. Again, this question was raised two years later (1691), in Mogadara *v.* Holt, 1 Show. 317, and 12 Mod. 15; and *Holt*, Chief Justice, said, "the time is well enough by the law of merchants, and that is the same with our law." And *Eyres*, Justice, said: "The law of merchants is *jus gentium*, and we are to take notice of it." And again, three years later (1694), in Willams *v.* Williams, Carthew, 269, the same question being raised, the rule in Carter *v.* Downish was emphatically confirmed; so also by Lord Holt in Hodges *v.* Steward, 12 Mod. 36 (in the same year); and, four years afterwards, the same question and the same decision may be found in Pink-

ney *v.* Hall, 1 Lord Raymond, 175, (1698). Again, in the same year, in Bromwich *v.* Lloyd, 2 Lutwyche, 1585, and in Hawkins *v.* Cardy, 1 Lord Raymond, 360.

In Edie *v.* The East India Co., 2 Burr. 1226 (1760), the court spoke in very positive language, as if they would prevent this question from ever being mooted again; *Foster*, J., saying: "The custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs, which are part of the common law, and local customs, which are not so. This custom of merchants is the general law of the kingdom, part of the common law, and therefore ought not to have been left to the jury after it has been already settled by judicial determinations." And Justice *Wilmot* says: "The custom of merchants is part of the law of England; and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs among merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinions of merchants thereupon." And, after referring to two cases, in which the precise question of this case as to the manner of indorsement was decided, he adds, these two cases "serve to prove that there is no such custom of merchants as the defendants pretend; for they could not have been so determined as they were, if there had been such a custom of merchants. Therefore these judicial determinations of the point are the lex mercatoria as to this question, for they settle what is the custom of merchants; which custom is the lex mercatoria, which is part of the law of the land." And finally, in Pillans *v.* Van Mierop, 3 Burr. 1669 (1765), Lord *Mansfield* said: "The law of merchants and the law of the land is the same. A witness cannot be admitted to prove the law of merchants. We must consider as a point of law."

There may seem to be an inconsistency on this point. In some of the cases it is said that merchants may be examined; while Lord Mansfield says that no witness can be admitted. But if the cases are examined, it will be found that the conflict is apparent only. The rule to be gathered from them is quite clear, and may be stated thus. If there is any question or uncertainty as to what the custom of merchants is, evidence on this

point may be addressed to the court for the purpose of removing doubts from their minds; but then it is their duty, when they have ascertained what the general custom of merchants is, to consider that as the law of merchants, and therefore as a part of the law of the land, and to recognize it, and apply it accordingly.

It may certainly be regarded as a well-established rule of American law, that this law merchant is an integral part of our own law, equal in its force and authority to any other. But there is still another principle in regard to the law merchant, which needs a more profound recognition, a fuller development, and a more constant recollection. It is, that the law merchant is not so much a branch of our municipal law as of public law. It belongs to both; and stands in such a relation to both, that the municipal law must constantly look to the law of nations for instruction and guidance in relation to it; or, in other words, the common law of any country adopts it from the common law of the world, and must not forget its origin.

In Molloy's work, de Jure Maritimo et Navali, he says, B. 3, c. 7, s. 15: "Merchandise is so universal and extensive, that it is in a manner impossible that the municipal laws of any one realm should be sufficient for the ordering of affairs and traffic relating to merchants. The law concerning merchants is called the law merchant from its universal concern, whereof all nations do take special knowledge." And the same idea is expressed in some of the cases from which we have already quoted, where it is said that the *lex mercatoria* is a part of the *jus gentium*. This doctrine is of great practical importance. If it had been more freely admitted in English jurisprudence, their law of shipping, especially in relation to liens, would have escaped some embarrassment and some uncertainty, much of which we are free from.

This principle recommends itself so strongly, and equally on the grounds of justice and expediency, that its early and general recognition is not surprising. There is a remarkable passage in the Pandects, which we think bears strongly upon it. In the title de Lege Rhodia de Jactu, to which we have already referred, Dig. L. 14, tit. 2, § 9, occurs what we should call a case stated to the Emperor Antonine, calling for a decision. The answer is, "I, indeed, am lord of the world; but the law is (the lord) of

the sea. Whatever the Rhodian law prescribes in the premises, let that be adjudged." Here is precisely the distinction we would suggest. The imperial despotism of Rome, while asserting its absolute and universal sovereignty, acknowledges that the ancient code of the little island of Rhodes, because it had been sanctioned and established by long usages among all whose business is on the sea, must govern there. So, too, we find the later codes, of Oleron, and Wisbuy, and the Consolato, for example, made not for one state or nation, but for all; and imposed upon them, not by the authority of a sovereign right, but by the sanction of a sovereign custom.

So should it be. We may well hope, for not theory only but history begins to promise this, that the great function of commerce is to bring the nations of the world together. Of the splendor and wealth derivable from commerce, there were examples in the earliest ages, even before Tyre; but they were very limited in their influence and in their duration. In that olden time, the same word sometimes meant a stranger and an enemy. In Greece the merchant was a pirate when occasion offered. He was better than this in Rome, but commerce held no high position there. In the middle ages, it began to assert its worth and dignity, and the greatest perhaps of the Medici was too proud of his success as a merchant, to permit that any other title should be added to his name. Still more lately, commerce has grown stronger, and with its strength its good influence has grown also. And, not to pause upon illustrations which might be drawn in great numbers from intermediate history, we may well believe that the great commerce, which now bridges the Atlantic, operates powerfully, and we may hope that it will operate successfully, to preserve the peace, — this peace so fertile of all good, — between the old world and the new. If, in the beginning of mankind, it was much that the family gathered its members into one fold; and if it was a later step which gathered families into states, this may not be the last step. The reasonable, as well as the hopeful, must be permitted to regard it as within the wide circle of possibility, that all states and nations may be gathered into one brotherhood of man. And if this — dream, perhaps it may be called — should ever become fact, assuredly commerce will be one of the most potent of the instruments by which so great a good shall be wrought.

The commerce of the world has reached at this moment an enormous development. It may well seem to us that it can go no further; that it stands on its culminating point. But it is more probable that the future will regard only as the beginning, that which may seem to us a consummation. Assuredly the growth and extension of commerce, its conformity with the essential principles of justice and of reason, and with the needs and the progress of mankind, and, indeed, all its prosperity and all its utility, from the highest to the lowest ground, will be advanced by constantly regarding the laws of commerce as intended to be universal; and, therefore, by respecting what in them is universal, in preference to that which is local and limited, and by giving to all questions that answer which shall make the principle or precedent resulting from it conform most perfectly with those which the nations have already settled by a general usage.

That the common law has already done this to a very great degree, and that it has not done this perfectly, has been already intimated. And it may not be out of place to close this sketch of the history of the laws of commerce, with the hope, that it may be one of the effects of the established freedom of this country that we may set such an example of wide and far-reaching sagacity in our shaping of the laws of commerce, that the nations of the world may join with us effectually in making the law merchant the law of the whole world.

CHAPTER II.

OF THE REGISTRY AND NAVIGATION LAWS.

SECTION I.

OF THE HISTORY OF THE REGISTRY ACTS.

We have seen in the preceding chapter, that the common law of England, from which that of America is derived, was formed while the great mass of valuable property consisted of land, and things fixed to the land. Negotiable choses in action and all those interests, represented and transferred by means of certificates and scrip, were either unknown or little used; and movables, or personal property in possession, constituted but a small portion of the wealth of the country. Hence the law of personal property is of comparatively recent origin; and only of late has it assumed that systematic and scientific form which now belongs to it.

Between these two, — the law of real property, and the law of personal property, — and differing in some particulars from both, is the law of shipping. That a ship is personal property, and not real property, is certain;[1] but it is a very peculiar kind of property, both in fact and in contemplation of law; and this was true in very ancient systems of law,[2] although neither commerce nor its great instrument, the merchant ship, had then reached any thing like the importance and magnitude they have now attained.

We have said the ship is the great instrument of commerce; and as England, from its insular, and otherwise favorable position, found its commerce becoming one of the most important sources of its power and prosperity, the laws we have mentioned

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[1] Roccus, note xxxviii.; Jacobsen's Sea Laws, 21.

[2] See Jacobsen's Sea Laws, *ut supra*.

in the previous chapter were enacted some centuries ago, providing, with great precision, for the nationality of the ship, and the trustworthiness and preservation of the evidence of that nationality. These laws are usually called The Registry and Navigation Laws. It is said that they originated in their present form some two hundred and fifty years ago, in the desire of Spain to preserve for herself the valuable commerce of her colonies in America.[1] In England, they may be regarded as beginning substantially with the 12 Car. 2, c. 18.[2]

The principal purpose of this and subsequent statutes was to prevent other nations from having the carrying trade between England and her colonies, and between other countries and England; and it was therefore provided, that only British ships should carry merchandise between England and her colonies, and that no merchandise should be brought from foreign countries to the British dominions, except by British vessels, or the vessels of the countries, of which the goods imported were the growth.[3] No vessel was to be deemed British, unless wholly built somewhere in the British dominions, excepting only those condemned and sold as prize;[4] and if a British ship became by any sale the property of an alien, it could not afterwards become a British ship again, by resale to a British subject.[5]

In order to secure to British ships these advantages, and to the British nation this monopoly, an exact and almost severe system of registration was adopted, and has remained in force, with but little change, for nearly two centuries. In 1850, how-

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[1] Reeves's History of the Law of Shipping, p. 35. See also 2 Browne's Civil and Admiralty Law, p. 125.

[2] The first statute passed for the benefit of navigation was the 42 Ed. 3, which enacted that all ships of England and Gascoigne which came into Gascoigne should be first freighted to bring wines into England before all other. This being, however, of but little importance, the statute of 5 Rich. 2, St. 1, c. 3, which provided that none of the king's subjects should thenceforth ship any merchandise in going out or coming within the realm of England, except in English ships, under penalty of forfeiting the merchandise or the value of it, has been considered as the primary one. Stat. of 6 Rich. 2, c. 8, enacted that this law should only apply, "as long as ships of the said liegeance were to be found able and sufficient in the parts where the merchants happened to dwell." For various subsequent statutes on this subject, prior to Stat. 12 Car. 2, c. 18, see the valuable treatise of Mr. Reeves on the History of the Law of Shipping.

[3] 12 Car. 2, c. 18, § 1.

[4] 13 & 14 Car. 2, c. 11, § 7.

[5] 3 & 4 Will. 4, c. 55, § 9.

ever, by the 12th and 13th Victoria, c. 29, the principle of "free trade" was, partially at least, introduced into the navigation laws; for it was provided, that ships, other than those of British build, may become British ships by register, if wholly owned by British subjects; and all ships may bring to England all merchandise, excepting that the queen (or king) of England, in council, may interpose against the commerce, or against the ships, of any country, such duties, charges, restrictions, or prohibitions, as will put the ships of those countries in British ports on the same footing on which British ships stand in the ports of that country.

The principal acts of registry and navigation in this country are those of December 31, 1792, entitled "An act concerning the registering and recording of ships and vessels;"[1] of February 18, 1793, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same;"[2] and of March 1, 1817, entitled "An act concerning the navigation of the United States."[3] By this last act, it is provided that no merchandise shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in vessels wholly belonging to citizens of the country, of which the merchandise is the growth or manufacture; or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation; under penalty of forfeiture of ship and cargo. And no merchandise whatever shall be imported from port to port of the United States in any foreign ship, (other than those imported in such vessel from some foreign port, and which shall not have been unladen,) under penalty of forfeiture of the merchandise. But it is provided, also, that this regulation shall not extend to the vessel of any foreign nation which has not a similar regulation in force. In an appendix to this volume, we shall give the principal statutes now in force; and it will be seen that we have not as yet relaxed our navigation laws, so far at least as to permit foreign built ships to become our own, or foreign ships to share in the advantages derived by our own from their nationality, in any degree.

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[1] Ch. 1, 1 U. S. Stats. at Large, 287.
[2] Ch. 8, 1 U. S. Stats. at Large, 305.
[3] Ch. 31, 3 U. S. Stats. at Large, 351.

SECTION II.

WHAT SHIPS MAY BE REGISTERED, AND WHAT ENROLLED.

The first registry act of 1789[1] provided that any ship or vessel built within the United States, and belonging wholly to a citizen or citizens thereof, or not built within the United States, but on the 16th May, 1789, belonging, and thereafter continuing to belong, to a citizen or citizens thereof, and of which the master is a citizen thereof, may be registered as directed in the statute. And, being so registered, shall be deemed a vessel of the United States. The twenty-second section of this act provides that vessels which come under the preceding description, and are of twenty tons burden or more, if destined for the coasting trade or fisheries, and not registered, must be enrolled, in order to enjoy the privileges of a ship of the United States.

This act, after a slight amendment by a suppletory act passed at the same session,[2] was repealed by the 30th section of the act of December, 1792.[3] But this last statute begins with providing, that all vessels registered under the provisions of the former act shall continue to be considered vessels of the United States, as long as they are wholly owned and commanded by a citizen or citizens of the United States.

This statute is now in force. It provides that all ships or vessels built within the United States, whether before or after July 4, 1776, or not built in the United States, but on and after the 16th May, 1789, belonging wholly to a citizen or citizens of the United States, may be registered as therein directed. Also, all ships or vessels hereafter captured in war by a citizen or citizens of the United States and lawfully condemned as prize; also, all that are adjudged to be forfeited for a breach of the laws of the United States.

To all these classes, the requirement is expressly attached, that they must be owned wholly by citizens of the United States. And there is an express proviso, that no such ship or vessel

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[1] Ch. 11, 1 U. S. Stats. at Large, 55.
[2] Ch. 22, 1 U. S. Stats. at Large, 94.
[3] Ch. 1, 1 U. S. Stats. at Large, 287, 299.

shall be so registered, or if registered shall be entitled to the benefits of registry, if owned in whole or in part by any citizen of the United States, who usually resides in a foreign country during the continuance of such residence; unless he be a consul of the United States, or a member of, or an agent for, some house of trade or copartnership consisting of citizens of these States who are actually carrying on trade within the States. And by the act of March 27, 1804, § 1,[1] it is provided that no vessel is entitled to registry, or to the benefits of registry, if owned by a non-resident naturalized citizen, who resides more than one year in the country from which he originated, or more than two years in any foreign country, unless he be a consul, or other public agent of the United States.

If any registered ship shall be sold or transferred, in whole or in part, in trust, confidence, or otherwise to a subject or citizen of any foreign state or prince, and the transfer is not made known to the collector and her register delivered up within seven days after the transfer, if in port, or within eight days after her arrival in the United States, if she were absent when sold, she shall be forfeited.[2]

The 22d section of the first statute of registration, that of 1789,[3] provides that ships, not registered, but destined for the bank or whale fisheries, or "from district to district," meaning the coasting trade, may be enrolled; and then follow certain provisions in respect to enrolment. This was afterwards deemed so important, that these two subjects were provided for in distinct statutes; that of Dec. 31, 1792,[4] above referred to, speaks only of registration. And at the same session was enacted the statute of Feb. 18, 1793,[5] which relates only to enrolling and licensing ships for the coasting trade and fisheries. It provides, in the first place, that all vessels, which may be registered, may be enrolled, and in a similar way, and a certificate given, which differs from the certificate of registry only in substituting the word "enrolment." Under this statute (sect. 8), a vessel that is only enrolled and licensed cannot proceed on

[1] Ch. 52, 2 U. S. Stats. at Large, 296.
[2] Act of 1792, ch. 1, § 16, 1 U. S. Stats. at Large, 287, 295.
[3] Ch. 2, 1 U. S. Stats. at Large, 60.
[4] Ch. 1, 1 U. S. Stats. at Large, 287.
[5] Ch. 8, 1 U. S. Stats. at Large, 305.

a "foreign voyage," without giving up her certificate of enrolment and her license, and being duly registered; and by a breach of this law, the vessel and cargo become liable to forfeiture. From the fear that the whale fishery, which carries a vessel round the world, might be deemed a "foreign voyage" within this prohibition, a custom grew up of considering whalers as not bound on a foreign voyage. By the Statute of 1803, ch. 9,[1] the master of any vessel bound on a foreign voyage is required to give a bond for four hundred dollars, that the certified copy of the list of the crew shall be delivered to the first boarding officer, at the first port in the United States, at which he shall arrive on his return home, and produce the persons, etc. Of this act we shall speak again, in reference to seamen. We advert to it now, only to remark, that in 1839 the master of a whaling ship having incurred the penalty of this bond, and, being sued, took the defence that it had been improperly required, as the ship had not been "bound on a foreign voyage."

The question came before Judge Story, and he decided that a whaling vessel was not bound on a foreign voyage, however far it might be the intention of her owners that she should go. Because, a foreign voyage meant a voyage to some definite foreign port or ports, for purposes of trade. No part of the ocean was foreign to us; only a port of another country could be so. And, even if a whaling ship proposed to enter into one or another distant port for the purpose of refitting, or otherwise supplying the exigencies of a whaling voyage, this did not make it a foreign voyage."[2] In 1838, Judge Story also decided that no registered ship can engage in the whale fisheries, without first surrendering her register, and being enrolled and licensed for the fisheries. And he quashed an indictment for a revolt on board such a ship, on the ground that it was not an American vessel.[3] But, on the other hand, Judge Betts, in the same year, held that a ship, with a register, might be legally employed on a whaling

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[1] 2 U. S. Stats. at Large, 203.

[2] Taber *v.* United States, 1 Story, 1. The action was debt on a bond given by the master of a whaling ship to the collector of the customs for the district of New Bedford. The vessel was about to sail on a whaling voyage, and the bond was given for the purpose of obtaining a clearance. It was held that no action could be maintained on it.

[3] United States *v.* Rogers, 3 Sumn. 342.

voyage without taking out a license.[1] In consequence of these decisions, an act was passed in 1840 (ch. 6),[2] providing that whalers, if registered, should be held to have lawful and sufficient papers, and, if only enrolled and licensed, should be deemed as effectually protected as if registered, if the voyages were completed, or until they were completed.

Only vessels of twenty tons or more need to be enrolled and licensed. Those under twenty tons may be licensed only. Stat. 1793, ch. 52.[3]

The 20th section of the Act of 1792,[4] provides that vessels built in the United States after 15th August, 1789, belonging wholly or in part to the subjects of foreign powers, in order to be entitled to the benefits of a ship built and recorded in the United States, shall be recorded in the office of the collector of the district in which the ship is built.

No ship can be registered anew as an American vessel, although of American build, and owned by an American citizen, unless it has been transferred to him by a bill of sale containing a certificate of the former registry. The language of the statute on this subject is: "In every such case of sale or transfer, there shall be some instrument of writing, of the nature of a bill of sale, which shall recite, at length, the said certificate; otherwise the said ship or vessel shall be incapable of being so registered anew." It follows, therefore, that the character and privileges of an American vessel are lost by a sale or transfer without the required instrument in writing, or are suspended until such instrument is made, and a new register thereupon granted.[5]

It is not very uncommon for private acts to be passed by

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[1] United States *v.* Jenkins, 2 Law Reporter, 146, 148. Both of these cases came up under the act of 1835, ch. 40, which provides that, "if any one or more of the crew of an American ship or vessel on the high seas, etc., shall make a revolt," he and they shall be punished, etc. It was held by Judge Story, that a ship which engaged in a whaling voyage without having surrendered her register, or taken out an enrolment and license, was not an American ship within the purview of this act. The contrary was decided by Judge Betts. He held that the ownership of the vessel might be proved in the same manner as that of any other chattel. See also United States *v.* Brune, 2 Wallace, C. C. 264.

[2] 5 U. S. Stats. at Large, 370.

[3] 1 U. S. Stats. at Large, 305.

[4] 1 U. S. Stats. at Large, 287, 296.

[5] Act of 1792, § 14, 1 U. S. Stats. at Large, 294.

Congress, authorizing the register of foreign ships which become in some way the property of American citizens, but which are not entitled to registers under the general law.[1]

SECTION III.

IN WHAT WAY VESSELS MAY BE REGISTERED, OR ENROLLED.

The statutes of 1792 and 1793, already referred to, are the principal statutes in relation to this subject, and we give them in full in the appendix. Here we would only remark, that the principal requirements are, that vessels should be registered or enrolled in the district in which is comprehended the port to which the vessel shall belong, which is that, "at or nearest to which," the owner or ship's husband usually resides. That her name shall be conspicuously painted upon her stern. That before registry or enrolment, the collector shall be assured by the oath of the owners, and the certificate of the builder and of surveyors, and, in some instances, of the master, as to the ownership, the build, burden, and description of the ship. And, if a ship, to be owned by foreigners, is to be recorded, in order to obtain the privileges of a ship built and recorded in the United States, similar precautions are required. The oath to be taken by the owner as to the ownership respects only the legal title, so far as concerns citizens of this country; the disclosure of any equitable interests vested in our citizens is not required; but only a denial that any subject or citizen of any foreign prince or state is directly or indirectly interested in the ship, or in the profits thereof.

Previous to the registry of any vessel, the owner and master must give a bond, which is graduated in the amount of the penalty in proportion to the size of the vessel, that the certificate of registry shall be used only for that vessel, and that it shall be delivered up if the vessel be lost, captured, burnt, or broken up, or otherwise prevented from returning to the port to which she belongs.

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[1] See 9 U. S. Stats. at Large, Private Acts, p. 2, 66, 154.

Steamboats may be registered or licensed in the name of the president or secretary of an incorporated company, without designating the names of the persons composing the company; but no part of such a vessel can be owned by a foreigner.[1]

Vessels employed in the whale fishery, if owned by an incorporated company, may be registered in a similar way, as long as they are wholly employed in that fishery.[2]

Any vessel which is entitled to registry, and is in a port other than that to which she belongs, may be registered at that port. This, however, is only a temporary register, and must be surrendered and cancelled when she arrives at the port to which she belongs, and a permanent register granted.[3] If the master of a registered vessel be changed, the name of the new master is indorsed upon the register, upon his making oath that he is a citizen of the United States.[4]

If any register be lost, the master of the vessel may make oath to the fact, and obtain a new one.[5]

As every register must state accurately the ownership, and the form and burden of the vessel, if a registered vessel be sold, in whole or in part,[6] to a citizen of this country, or be altered in her form or in her burden, the old register must be delivered up, and a new one taken out, or the vessel is no longer entitled to the privileges of a vessel of the United States. If the sale take place in a district, other than that to which she belongs, a temporary register may be there given, to be exchanged for a permanent one when she reaches her home port, in the same way as is done in respect to the original register.[7] So, too, if a ship be bought by an agent or attorney for a citizen of the United States, in a district more than fifty miles from that to which she belongs, she shall be temporarily registered there, until her arrival at her home port.[8]

By the act of June 27, 1797,[9] it was provided, that no regis-

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[1] Act of March 3, 1825, ch. 99, 4 U. S. Stats. at Large, 129.
[2] Act of March 3, 1831, ch. 115, 4 U. S. Stats. at Large, 492.
[3] Act of 1792, ch. 1, § 11, 1 U. S. Stats. at Large, 292.
[4] Act of 1792, ch. 1, § 23, 1 U. S. Stats. at Large, 297.
[5] Act of 1792, ch. 1, § 13, 1 U. S. Stats. at Large, 294.
[6] Act of 1792, ch. 1, § 14, 1 U. S. Stats. at Large, 294.
[7] Act of 1792, ch. 1, § 11, 1 U. S. Stats. at Large, 292.
[8] Act of 1792, ch. 1, § 12, 1 U. S. Stats. at Large, 293.
[9] Ch. 5, 1 U. S. Stats. at Large, 523.

tered ship, which should be seized, or captured and condemned, under the authority of a foreign power, or by sale become the property of a foreigner or foreigners, should be entitled to or become capable of a new register, although the vessel afterwards became American property. There is, however, a proviso that the act shall not affect those who own any ship or vessel at the time of her seizure or capture, or prevent such owner in case he regain a property in such vessel, so condemned, by purchase or otherwise, from claiming and receiving a new register for the same.

It will be seen that the proviso appears to be limited to vessels captured and condemned, and, in that way, passing into the possession of foreigners, and that, as to all others, the statute puts an American ship, which has once become the property of a foreigner, for ever after on the footing of a foreign built ship. The statute, however, has been construed otherwise, at least in one case. A valuable vessel belonging to Calais, Maine, was wrecked on the coast of the British provinces, there condemned as wreck, and sold and bought by Englishmen; and the insurers paid for her. But, by a very favorable turn of wind and tide, she was got off at little expense, and found to be but slightly injured. At that time, however, she could not obtain a register as an English vessel, and certainly not as an American vessel, if sold to a new American owner. But her English purchasers brought her to Calais, and there sold her to her original owners, who were the only persons who could buy her and have a register, and who paid for her but a small price. And, in their hands, she continued to be registered as an American vessel. This case has not been reported.

SECTION IV.

OF THE EFFECT OF REGISTRY OR ENROLMENT.

The statutes of registry and enrolment are now somewhat numerous and complicated; and those of 1792 and 1793 are very long, and go into a great variety of details. For these we must refer to the Appendix, where will be found all these statutes. Here we only remark, that enrolled vessels must be

licensed annually for the employment or business in which they are to engage, and this is stated in the license, and they are not authorized by it to engage in any other; and if they be found with a forged or altered license, or making use of a license granted to any other ship or vessel, the vessel and cargo are forfeited.

These words, however, do not apply to a vessel licensed for one thing and doing another thing under her license; it would seem, therefore, that such a vessel is only not entitled to the privileges of a vessel of the United States.

If they are in a port other than that to which they belong at the time when their license expires, they may there obtain temporary registers. All licenses must be renewed within three days after they expire, or within three days after the vessel's arrival at a port, if they expire while she is at sea. A registered vessel may engage in the coasting trade, becoming thereafter subject to the regulations provided for coasting vessels; and an enrolled and licensed vessel, if bound on a foreign voyage, may be registered.

We have quoted but a small part of the requirements of these statutes. It must, however, be obvious, that all this complication between the registering and enrolling of vessels, and these frequent changes, must cause a great deal of trouble, not to say embarrassment, which should be avoided, if this can be done without sacrifice or greater inconvenience. When they were originally enacted, and for some time afterwards, heavy tonnage duties were levied in certain cases, which were thought to constitute quite an important part of the revenue. These are practically abolished, or nearly so. The details and exact provisions to which we have referred were perhaps necessary to carry all the original objects of these statutes into effect. But it is, we believe, a general opinion among commercial men, that they are not necessary now, and that all the advantages and securities of our navigation laws would be preserved, and in a far simpler and more convenient way, if but one register were given to all vessels, whether engaged in the foreign or in the coasting trade, or in the fisheries. This might be permanent, and all transfers of title, and all interests and ownership, in part or in whole, and all such changes of employment, as it should be thought necessary to notice, might be indorsed upon the register.

Our statutes do not positively require any registration or enrolment of any vessel. The owner of a ship may keep it lying at a wharf until it shall decay there, and not violate any law. But until he registers or enrolls his ship, she is not an American vessel. Nor, indeed, can he carry on in her any trade whatever, because she can have neither the papers nor privileges of a foreign ship, nor of an American ship. If she engages either in the foreign or coasting trade, or fisheries, she is liable to forfeiture. These disadvantages and disabilities, springing from the want of a register, are quite sufficient to make an exercise of the right of obtaining registry universal. A similar practice exists, under similar requirements, in nearly all commercial and civilized nations. And probably no vessel of any magnitude now sails the ocean without having documents on board to prove her nationality and ownership.

It may be well to remark, that an act of congress passed March 5, 1856, authorizes the secretary of the treasury to change the name of any vessel, when, in his opinion, good cause exists therefor.

Some interesting questions under these and later registry acts have passed under adjudication, beside those already presented. Stating these chronologically, we begin with a case which occurred the year after the statute of enrolment was passed.[1] A schooner, licensed as a coaster, cleared for St. Mary's in Georgia, but went to Port-de-Paix, and was there sold to a Frenchman by the master, by order of the owner. Upon her return to South Carolina, she was libelled, and decreed to be forfeited; the court recognizing a distinction between the two acts, because that for registering permits sales of vessels at sea, or in a foreign port to foreigners, while the act for enrolment and license prohibits a sale to foreigners altogether. But it was also said that a licensed owner might dispose of his vessel as he would, upon delivering up his license.

In 1805, upon a sale of a licensed vessel to an alien in Philadelphia, it was said,[2] that if a *sea vessel* (meaning a registered vessel) is assigned to a foreigner, she loses the privileges of an

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[1] United States *v.* Schooner Hawke, Bee, 34.

[2] Philips *v.* Ledley, 1 Wash. C. C. R. 226.

American bottom; but if a *coasting vessel*, (meaning one enrolled and licensed,) be so sold, the sale is not void, but the vessel is liable to forfeiture.

In 1806,[1] a vessel was forfeited because a false oath was taken to procure a register. The interesting question arose, when and by what means the property in a forfeited vessel vested in the United States. And it was held that the United States might elect to proceed against the vessel as forfeited, or against the party taking the false oath for its value. But that unless, and until, process for forfeiture is begun, the property in the vessel does not vest in the United States. Therefore, the vessel having been sold to the assignees of the party taking the false oath, and they having sold the vessel, and received the proceeds in trust for his creditors, the United States could not maintain an action for money had and received against the assignees.

In 1807,[2] a ship, while at sea, was sold in part to an American citizen, but was not registered anew. And, after the arrival of the ship in Philadelphia, she was resold by the purchaser to the original owners, before any report or entry. And it was held that the ship did not thereby lose her privilege as an American ship, or become subject to foreign duties.

In 1814,[3] of two partners, in a commercial house doing business in New York, one, Lenox, resided in New York, the other, Maitland, was a resident merchant of Great Britain. To obtain a register, Lenox made oath in New York, that he, "together with W. Maitland, of New York," were the only owners. At that time, Maitland was domiciled in Great Britain. The court held that the vessel was subject to forfeiture, although the oath was taken innocently, and in ignorance of the character imparted to Maitland by his residence in England.

In 1815,[4] it was decided, that, if the master of an American ship be an American citizen resident abroad, the ship does not thereby lose her right to pay only domestic duties. But that if such a person be the owner of a vessel, it cannot be entitled by registry to the privileges of a vessel of the United States.

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[1] United States *v.* Grundy, 3 Cranch, 337.

[2] United States *v.* Willings, 4 Cranch, 48; s. c. 4 Dall. 374.

[3] The Venus, 8 Cranch, 253.

[4] United States *v.* Gillies, Peters, C. C. R. 159.

In 1818,[1] it was decided, in a somewhat curious case, that the provisions of the 27th section of the Act of 1792,[2] that a ship shall be forfeited if any certificate of registry or record shall be fraudulently or knowingly used for her, to the benefit of which she is not then actually entitled, apply as well to vessels, which have never been registered, as to those, to which registers have been previously granted.

In 1824,[3] it was held, that, if a registered vessel be transferred in a foreign port to an alien, for the purpose only of evading the revenue laws of a foreign country, and with an understanding that, when this purpose is accomplished, she shall be reconveyed to the original owner, the vessel is liable to forfeiture under the 16th section of the act. And if she continues to use her original register after such transfer, she is liable to forfeiture under the 27th section.

In 1826,[4] it was decided, that, as the original register is required by law to be transmitted to the register of the treasury, when a vessel is lost; and, as this register is to be then cancelled, but not destroyed, it is a document which the law requires to be deposited and preserved in the register's office. And it was also said, that, in a time of universal peace, the register is the only document which must be on board, to satisfy a warranty of national character.

In 1835,[5] occurred a case of some interest, from its peculiar facts. The United States sought to enforce a forfeiture against a brig, of which it was alleged that a Spaniard, resident in Cuba, was an owner or part-owner, under cover of the name of an American citizen. Many circumstances indicated this, and had a strong tendency to prove it. But the court said, that, the prosecution being highly penal, the infractions of the law must be established beyond reasonable doubt. And that, although most ingenious frauds are often practised under our revenue laws, such acts cannot alter the established rules of evidence.

In 1839,[6] it was found that enrolments in a certain custom-

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[1] The Neptune, 3 Wheaton, 601.
[2] Ch. 1, 1 U. S. Stats. at Large, 287, 298.
[3] The Margaret, 9 Wheaton, 421.
[4] Catlett *v.* Pacific Ins. Co., 1 Paine, C. C. R. 594.
[5] United States *v.* The Brig Burdett, 9 Peters, 682.
[6] United States *v.* Bartlett, Davcis, I.

house were occasionally made, as matter of convenience, on the oath of the master only. But, on such a case coming before the District Court of Maine, it was held that such an enrolment was wholly void; and could not confer upon the vessel the rights and privileges of a vessel of the United States.

In 1846,[1] a case came up under the first section of the Act of March 1, 1817, (3 U. S. Stats. at Large, 351,) which provides that goods shall not be imported from any foreign port, except in vessels of the United States, *or in such foreign vessels as belong to the citizens of that country of which the goods are the growth*, etc. The question arose, whether goods, the growth or production of the East Indies, could be brought to this country in English ships. It was held that they might, because by country was meant the entire nation, and not merely a section or portion of territory belonging to the nation.

It is important to remember, that presentation to the custom-house for registration is wholly voluntary; and that the owners of the ship present it for registration, only to secure to themselves certain benefits or privileges thereby. For this circumstance assists in determining some of the numerous and difficult questions, which have arisen in reference to the force and authority of the register, as a record, as public notice, or as evidence of ownership or interest, or the want of it. Thus, if one claims to prove his title by the fact that his ownership appears on the register, it may be answered that he caused it to be there by his own act, and cannot in this way make evidence for himself.

On the other hand, if he wishes to prove his interest when his name is not there, or if another wishes to charge him as owner by proof outside of the register, which does not show him to be an owner, it may be said that registration is no necessary incident to ownership, and therefore the want of registration or of any name in the register justifies no conclusion against the ownership. And, in general, as the law simply offers to registered ships certain privileges, which are exactly defined, it is not willing to recognize in the fact of registration, any other efficacy than that of imparting these privileges, or to permit the absence

[1] United States *v.* The Ship Recorder, 1 Blatchf. C. C. R. 218.

of registration to have any other effect than merely to prevent these privileges from attaching to the ship.

On the other hand, registration is founded on the oath of the party, and is a solemn act of the law, and it is not reasonable to make it wholly insignificant. And, an eminent judge in England, (Lord Eldon,) has intimated that the registry laws of that country have, as one of their purposes, the identification of property.[1]

The questions of this kind, which have arisen, are very many, and very various. The whole subject of registration of ships is unlike any thing else required by the law, or known to the law. The register has been offered by a party litigant in cases of sale of ship or goods, of contracts of affreightment, of insurance, of forfeiture, or for breach of law. It would be very difficult to exhibit these questions, or the principles which may determine them, aside from the cases in which they arise. And we have preferred to present them together in a note to this passage, in which all the cases are cited and classified, as well as we have been able to do it, and those of most interest examined at some length.[2]

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[1] *Ex parte* Yallop, 15 Ves. 60.

[2] It appears to be well settled in the English courts, that the register is not to be considered as a public document, or record, but a private instrument, and the mere declaration of the party making it. Flower *v.* Young, 3 Campb. 240; Pirie *v.* Anderson, 4 Taunt. 652, 657 (per *Heath*, J.). The object of the British registry acts being to secure to the ships of Great Britain certain privileges, and not to create new evidence of ownership in vessels. *Bayley*, J., in Tinkler *v.* Walpole, 14 East, 226, 233. See, however, the remark of Lord Chancellor *Eldon*, in *Ex parte* Yallop, 15 Ves. 60, that the Registry Acts of 26 Geo. 3, c. 60; 34 Geo. 3, c. 68, were drawn upon the policy, that it was for the public interest to secure evidence of the title to a ship, from her origin, to the moment in which you look back to her history.

Some of the earlier American cases seem to countenance the doctrine, that the register is a public record or title. Thus, in the United States *v.* Johns, 4 Dall. 412, which was a prosecution under a criminal statute, a certified copy of a *manifest of cargo* was admitted in evidence, on the ground, apparently, that the book of manifests, kept by the collector in conformity to the impost laws, was a record.

So in Coolidge *v.* New York Firem. Ins. Co. 14 Johns. 315, the court say: — "The record required to be kept by the collector of the registry of ships or vessels is such a one, that a copy of it, compared with the original by a witness who can testify to its being a true copy, would be good evidence of the facts it sets forth."

But the great majority of the American cases evidently take the same ground as the leading English authorities, and it is expressly stated by Mr. Justice *Sayford*, in Jones *v.* Pitcher, 3 Stew. & Port. 135, 155, who seems to doubt the authority of United

States *v.* Johns, *supra*, that the register is not entitled to more credence in this country than in Great Britain.

It follows from this *ex parte* character of the registry, that it is not even *primâ facie* evidence to charge those who are not shown to be parties to it, *by their own act or assent*, although their names appear upon its face. Flower *v.* Young, *supra;* Tinkler *v.* Walpole, 14 East, 226; Baldney *v.* Ritchie, 1 Stark. 338; Jones *v.* Pitcher, *supra;* 1 Greenl. Ev. § 494; M'Iver *v.* Humble, 16 East, 169; Fraser *v.* Hopkins, 2 Taunt. 5; Cooper *v.* South, 4 Taunt. 802; Pirie *v.* Anderson, 4 Taunt. 652; Rands *v.* Thomas, 5 M. & S. 244. See, however, Stokes *v.* Carne, 2 Campb. 339, where Lord *Ellenborough* seemed to think, that, where no notice of an intent to deny the ownership was previously given, the register might be *primâ facie* evidence to charge several part-owners, when obtained on the oath of one of them only, although admitting that, had the facts of the case been different, he should have required stricter proof. In Myers *v.* Willis, 17 C. B. 77, 33 Eng. L. & Eq. 204, 209, *Jervis*, C. J., said: — "It is admitted that the law is now different from what it was formerly, when it used to be considered that the register only was to be looked at, and that it alone was conclusive as to the ownership of the vessel, and conclusive therefore of the liability of the party appearing thereon as owner; but it is now settled that the question of liability in these cases is to be determined in the same way as in all other cases of contract, by ascertaining with whom the contract was made." This case was affirmed in the Exchequer Chamber, 18 C. B. 886, 36 Eng. L. & Eq. 350. See also Hackwood *v.* Lyall, 17 C. B. 124, 33 Eng. L. & Eq. 211; Mitcheson *v.* Oliver, 5 Ell. & Bl. 419, 32 Eng. L. & Eq. 219; Brodie *v.* Howard, 17 C. B. 109, 33 Eng. L. & Eq. 146; Mackenzie *v.* Pooley, 11 Exch. 638, 34 Eng. L. & Eq. 486.

Against the person on whose affidavit it is obtained, the registry may be evidence of the facts recited, being his own declaration made under the sanction of an oath. Cooper *v.* South, *supra;* Pirie *v.* Anderson, *supra*, per *Chambre*, J.; Flower *v.* Young, *supra;* Hacker *v.* Young, 6 N. H. 95; Ligon *v.* Orleans Nav. Co. 19 Martin, La. 682; as in favor of his creditors, Bixby *v.* Franklin Ins. Co. 8 Pick. 86. But to make it so, he must be connected with it by proper proof of the oath. Smith *v.* Fuge, 3 Campb. 456; Jones *v.* Pitcher, *supra*. And, where the affidavit had been destroyed by fire, Lord *Ellenborough* held that the register book was not sufficient as secondary evidence of its existence, but that witnesses must be called who had seen the affidavit, and knew it to have been made by the party sought to be charged. Teed *v.* Martin, 4 Campb. 90.

So, the register is not by itself evidence in a suit between third parties, of the national character of the vessel being *res inter alios acta*. Reusse *v.* Meyers, 3 Campb. 475. And it does not affect the question of property in such a case. Bixby *v.* Franklin Ins. Co. *supra*.

As to some of the facts sworn to, such as the national character of the ship at the time of registry, we apprehend that the registry and affidavit are *conclusive* against the party making them, he being estopped to deny what he has affirmed under oath. But as to the fact of *ownership*, the registry in this country is only *primâ facie* evidence against him. Ring *v.* Franklin, 2 Hall, 1; Weston *v.* Penniman, 1 Mason, 306; Leonard *v.* Huntington, 15 Johns. 298; Bixby *v.* Franklin Ins. Co. *supra;* Colson *v.* Bonzey, 6 Greenl. 474; Lord *v.* Ferguson, 9 N. H. 380.

The reason of this is, in the first place, that the oath required by the American registry act has been determined to apply only to the *legal* ownership, so that registry in the name of one person is consistent with an equitable title in another. Weston *v.* Penniman, *supra*. "The oath required by the Registry Act of 1792, to be taken by the owner," says Mr. Justice *Story*, in this case, "respects only the legal ownership of the property, and does not require a disclosure of any equitable interests vested in citizens

of the United States, but only a denial that any subject or citizen of any foreign prince or state is directly or indirectly interested by way of trust, confidence, or otherwise, in the ship, or in the profits or issues thereof. It is sufficient that the legal interest is truly stated; and if there be any equitable interest or trust in favor of any other citizen of the United States, no fraud is committed upon the law. Suppose a mortgage made of a registered ship, may not the mortgagee truly declare himself the legal owner, notwithstanding an equitable right of redemption in the mortgagor?"

See also that a mortgagee may take out a registry in his own name. Ring *v.* Franklin, 2 Hall, 1.

Such being the case, it follows that the legal owner, as a mortgagee or trustee, is not estopped by the register to show that the actual beneficial ownership is in a third party, and consequently it is not conclusive evidence against him. See Plymouth Cordage Co. *v.* Sprague, Sup. Jud. Ct. Mass., 2 Law Reporter, 365. There is an early Connecticut case, Starr *v.* Knox, 2 Conn. 215, 222, which maintains a contrary doctrine, namely, that registry is such a publication of ownership to the world as will make the party to it liable as owner, unless the qualified nature of his title as mortgagee appears on the register itself by indorsement or otherwise. But, from the authorities above cited it appears that this would not now be considered law.

Under the British Registry Acts, 8 & 9 Vict. c. 89, § 37, 38, and 45, the question has arisen whether, if a party, who is the registered owner, makes a contract to sell the ship, which agreement is not registered, and subsequently transfers the vessel, for a valuable consideration, to a person having notice of the former agreement, who has it duly recorded, the party making the first agreement has any remedy against the ship or its proceeds. In McCalmont *v.* Rankin, 8 Hare, 1, 2 De G., M'N., & Gor. 403, it was held that he had not. So in Combes *v.* Mansfield, 3 Drewry, 193, the builder of a vessel mortgaged her to A, and afterwards by a second mortgage to B. He afterwards had her registered in his own name. The mortgages were never recorded. The ship was then transferred by an absolute bill of sale to B, and a registry taken out in his name. This was only meant to be a mortgage. To obtain more money, and to pay off B, the builder agreed with B that he should transfer the vessel to C. This was done, and C's name appeared on the registry as owner. C knew of the mortgage to A. Held, that A had no claim against C. The court said: "Now it is clear that, if this were any other species of property, land or leaseholds, or indeed any other kind of property, any person taking by a deed an assignment of the legal interest, with notice at the time of a prior equitable charge, would take only subject to that charge. The question is, whether the ship registry acts preclude the application of that doctrine. The cases in this court are numerous, and they clearly establish this: that a mere contract in writing, however precise and regular, for the purchase and sale of a ship, does not entitle the purchaser to any relief, either as against the vendor, or as against any other person, who coming afterwards, with knowledge of the contract, takes an assignment of the ship and has it registered."

In Armstrong *v.* Armstrong, 21 Beav. 78, shares in a ship, purchased with A's money, were registered in B's name. After A's death, B entered into an agreement with his representatives admitting their right, and for a valuable consideration agreeing to sell the shares at the end of twelve months, and to account for the proceeds. B accordingly sold to C. Held, that though the ship registry act prevented the representatives enforcing any right against the ship, still they were entitled to recover the purchase-money in the hands of C. In Parr *v.* Applebee, Kt. *Bruce*, L. J., 35 Eng. L. & Eq. 218, the owner of a ship, being indebted to a firm, mortgaged it to A. B., one of the partners, to secure the debt. This mortgage was duly recorded. Afterwards, he executed a further charge to A. B. for money due from himself, or from him and his partners, from time to time, to the firm of which A. B. was a member. This

was not registered. He afterwards executed a further charge in favor of other persons, who registered their security. The court held that the unregistered charge was inoperative. See also Lindsay *v.* Gibbs, 2 Jur. (N. S.) 1039, Ch. The case of Whitfield *v.* Parfitt, 4 De G. & Smale, 240, 6 Eng. L. & Eq. 48, may seem to contravene the doctrine laid down in Coombs *v.* Mansfield, *supra;* but they are entirely consistent. In Whitfield *v.* Parfitt, the plaintiff, the registered owner, transferred the ship to the defendant by an absolute bill of sale. There was indorsed on the bill a memorandum of the same date as the bill itself, that, on the plaintiff's repaying to the defendant, the sum of 100*l.*, with interest, the bill of sale should be null and void. The bill of sale was registered, but the indorsement was not. Subsequently, the defendant transferred the vessel to a third party, but this was never registered. It was held, that the plaintiff was entitled to redeem. The registry acts do not apply to the cargo or freight. Armstrong *v.* Armstrong, 21 Beav. 78; Langton *v.* Horton, 5 Beav. 9. Nor, do they prevent a lien being created on a certificate of original registry deposited by an unregistered owner to secure advances made for the use of the ship. Clarke *v.* Batters, 1 Kay & Johns. 242. The registry of a ship is, however, conclusive as to the ship being in a fit state to be registered under the 8 & 9 Vict. c. 89, although there may be evidence to show that the ship was not so completed at the time of the registry. Coombes *v.* Mansfield, 3 Drewry, 193. Under the former acts a distinction was taken by Lord Eldon, between trusts created by the act of parties, and those arising by implication of law. The former were held to be within the acts, the latter not. Hence, under them the registered owner would have been estopped to show an equitable title in another, where it did not appear on the registry. Curtis *v.* Perry, 6 Ves. 739; *Ex parte* Yallop, 15 Ves. 60, 68. See also, as to the equitable ownership under these laws, *Ex parte* Houghton, 17 Ves. 251; Dixon *v.* Ewart, 3 Meriv. 322; Mair *v.* Glennie, 4 M. & S. 240; Robinson *v.* Macdonnell, 5 M. & S. 228; Hay *v.* Fairbairn, 2 B. & Ald. 193; Monkhouse *v.* Hay, 2 Brod. & B. 114; Lister *v.* Payn, 11 Simons, 348; Thompson *v.* Smith, 1 Madd. Ch. 395.

2d. From its very nature, the registry can only be evidence of ownership at the time it was made, and the continuation of the exclusive title in the parties, whose names appear on its face, is a mere presumption of fact, liable to be disproved by competent evidence of a subsequent transfer to others.

But, by the provisions of the British acts, as we shall see hereafter, such a change of ownership, unless inserted in the registry, was null and void; hence, the registry became, as against all the world, conclusive evidence of the state of the title at any moment subsequent to its execution, and therefore conclusive against the existence of any legal ownership in other persons, at any such time. Camden *v.* Anderson, 5 T. R. 709; Westerdell *v.* Dale, 7 T. R. 306; Marsh *v.* Robinson, 4 Esp. 98; Curtis *v.* Perry, *supra;* *Ex parte* Yallop, *supra;* *Ex parte* Houghton, *supra;* Mestaer *v.* Gillespie, 11 Ves. 621, 625.

But the registry acts do not preclude the persons, who are named in the certificate of registry, from showing how, and in what proportion, they are respectively entitled. *Ex parte* Jones, 4 M. & S. 450. And the statutes, having been passed for the reasons of domestic policy, have no application to foreigners, whose rights are to be determined by the law of nations. Therefore, the foreign part-owner of a privateer is liable for damages decreed against the owners generally, although his name is not on the registry. The Nostra Signora de los Dolores, 1 Dods. 290.

In this country, a transfer, against the provisions of the registry act, may be valid and binding, and therefore the registry can never be conclusive evidence against parties to it, that the legal title is in them at any moment, except that, when it is made. See cases before cited, and especially Colson *v.* Bonzey, *supra.* See also the case of Vinal *v.* Burrill, 16 Pick. 401, which was assumpsit with a count on an *insimul com-*

putassent, by one claiming to be the ship's husband, for disbursements relating to the ship on a certain voyage, against several defendants as joint owners. In this case, the court held, that, although the registry was in the name of one of the defendants only, the plaintiff might introduce parol evidence to show that the others were jointly interested with him in a particular voyage, and liable as owners *pro hac vice*.

The precise ground of this ruling does not appear in the decision; it would seem, on the whole, as if the judges were of opinion that the ownership, under the registry act, means only the general property or title, and does not exclude a transient and special property in another, such as an ownership *pro hac vice*.

On the other hand, it may be that the agreement, between the registered owner and the others, was subsequent to the registry, and that the court meant merely to affirm the principle that registry is not conclusive evidence of ownership, and it is cited as an authority to this point, by Perkins in his notes to Abbott.

As the registry in this country is not conclusive evidence of property against those who are parties to it, and not even *primâ facie* evidence between third parties, it follows, as a matter of course, that it is not, by the force of the statute, made *exclusive* evidence of ownership in such cases. Lord *v.* Ferguson, 9 N. H. 380; Hozey *v.* Buchanan, 16 Pet. 215.

And it has been held, that possession and assertion of ownership, and notoriety are stronger evidence of property in a ship than registry without possession. Bas *v.* Steele, 3 Wash. C. C. 381, 390. See also The S. G. Owens, 1 Wallace, Jun. 366.

In Great Britain, the distinction has been taken that although property in a ship may be proved, as in the case of any other chattel, at least *primâ facie*, by proof of possession and claim of title, proof of registry is necessary to make such evidence admissible. Pirie *v.* Anderson, *supra*. In an earlier case, however, where the plaintiff proved possession under claim of title, Lord *Ellenborough* held this to be *primâ facie* sufficient, and that he need not produce any evidence of registry, although it came out in cross-examination, that his title was derived from a bill of sale. A prior registry in the name of a third party, one Vincent Williams, and a subsequent register to the same person, upon a sale by decree of a vice court of admiralty, were offered in evidence to disprove the ownership by the defendants; but his lordship considered that they were both perfectly consistent with a title in a third person in the interval, agreeably to the averment in the declaration, and did not render any further proof by him requisite. Robertson *v.* French, 4 East, 130. With respect to the last part of this ruling, Lord *Ellenborough* may have considered that the defendants having shown by their own evidence that Williams must have parted with his title, at some time or other in the interim, it came to the same thing, as to the period in question, as if they had offered no evidence whatever, leaving the presumption arising from the plaintiff's possession in full force. It seems to us likewise, that the registries in this case were by themselves *res inter alios actæ*, and consequently, if objected to, could not have been admitted at all in evidence of facts stated therein, as was subsequently held by the same learned judge in Reusse *v.* Myers, 3 Campb. 475, before cited. But we cannot help thinking, that, since the claim of title appeared to be founded on a bill of sale, the latter should have been produced by the plaintiff as the better evidence, as was objected by the counsel for the defendants; and that any such proof, without some evidence of compliance with the registry laws, was contrary to the policy of those acts, the true rule being that stated in the later case, above cited. See also Thomas *v.* Foyle, 5 Esp. 88, where the same learned judge permitted the plaintiff to prove his ownership by parol, although it was objected that the bill of sale should have been produced in evidence, no attempt being made to set up any title elsewhere.

Lastly, is the register *primâ facie* evidence of ownership *in favor* of parties to it? In England, a practice of admitting it as such seems, from the language of Lord *Ellen-*

borough, at one time to have prevailed, and at Nisi Prius, *Bayley*, J., remarked, in the case of Tinkler *v.* Walpole, *supra*, "This is very different from the case of a person publicly asserting that he is owner, by the act of registering a vessel in his own name; that may be *primâ facie* evidence for him that he is owner; because he thereby publicly challenges all persons that he is so." But Lord *Ellenborough*, in Flower *v.* Young, denied that such could be the case; the registry amounting to nothing more than the declaration of the party, he remarked, was clearly not admissible in his favor. And the court were of the same opinion in Pirie *v.* Anderson, *supra*, *Gibbs*, J., saying: — "It was strongly urged for the defendant, that, because the title cannot be complete without the register, therefore the register shall be *primâ facie* evidence of the title; that does not at all follow. If the legislature makes an act necessary to complete a title, it does not thereby make that act alone to be proof of the title; if such were the law, a man might make for himself a title to any thing in the world. With respect to the *dictum* of *Bayley*, J.," (cited *supra*,) "I am satisfied that he said that, because he would not take on himself to decide a point which had never been decided, which was not the point raised at *nisi prius*, and which it was not necessary to decide in that case." The argument, here stated to have been used in favor of the admission of the evidence, has no force in this country, where registry is not made necessary to complete a title; nevertheless, we should consider the question as more open to doubt than these cases left it in England.

In the case of The Mary, 1 Mason, 365, a similar objection was made. But *Story*, J., held, without reference to its validity, that the defendants were, under the circumstances, estopped from making it by their own acts on record. And it was held by the court in Sharp *v.* Unit. Ins. Co. 14 Johns. 201, that the registry was not *primâ facie* evidence in favor of the plaintiffs, whose names did not appear on it, as proof that they were *not* owners of the ship. But it is to be remarked, that this ruling does not seem to have been requisite to the decision of the case. The question being, whether the plaintiffs should be allowed to make use of the register to rebut the presumption of ownership arising from their having procured a policy of insurance on a ship in their own name for the purpose of recovering back the premium. This case cannot, therefore, be considered as of authority otherwise than as a dictum. See also Ligon *v.* Orleans Nav. Co. 19 Mart. La. 682.

On the other hand, in Weaver *v.* The S. G. Owens, 1 Wallace, Jun. 365, the court take no such distinction between the effects of the register as evidence *for* and *against* those in whose name it stands, but hold generally, that in a question of ownership *inter partes* it is *primâ facie* evidence of title in the person in whose name the ship is registered, liable to be rebutted by proof of actual ownership in another, whether temporary or absolute, as lessee or vendee.

See, however, Lincoln *v.* Wright, 23 Penn. State Rep. 76. The action was brought against the plaintiffs in error for supplies furnished by the defendants for a vessel. The case turned on the point, whether the plaintiffs were owners at the time the supplies were furnished. There was evidence of a sale prior to the time, but it was shown that subsequently the plaintiffs made oath at the custom-house that they were the sole owners, and it was held that this evidence was admissible. The court said: — "A vessel may be sold, and, because the vendor retains the legal title as security for the purchase-money, he has her registered in his own name; a mortgagee may do the same thing, while the mortgagor keeps the possession; or an unconditional sale may be made, and the register be left unchanged. For these reasons, a certificate of the register is no evidence in favor of the person named therein as owner, nor in actions between other parties. It will not establish an insurable interest in the registered owner as against an underwriter, nor will it disprove such interest in the assured when the policy has been taken for the benefit of other persons. Neither would it be any defence whatever, in

an action for supplies against one for whose profit the ship is navigated, to show that she is registered in another name. But all this does not prevent us from saying that a man's declaration on oath is some evidence *against* him of the fact therein asserted. It is not conclusive, certainly. The defendants were permitted to show, if they could, that they had no actual interest in the ship; but the jury did not think they succeeded, and if they were wronged in this we cannot help it." See also Dudley *v.* The Steamboat Superior, U. S. Dist. Ct. Ohio, 3 Am. Law Reg. 622. In a criminal case, where it is necessary to prove that the person indicted was on board a ship owned wholly or in part by an American, it has been held that the register is not even *primâ facie* evidence of such ownership. United States *v.* Brune, 2 Wallace, C. C. 264.

CHAPTER III.

OF THE TRANSFER OF A SHIP BY SALE.

SECTION I.

OF THE SALE OF A SHIP WITHOUT WRITING.

It has been already remarked, that a ship is a chattel, and can only be regarded as such by a system of law which divides all property into real, (or land, or of the land,) and personal, which includes whatever is not real. It would seem, therefore, that the sale of a ship should be, so far as that law is concerned, governed by the same rules which are applied to the sales of other personal property. But these rules neither prescribe nor prefer any method or form, nor do they require any special or peculiar evidence of the few things which are essential to a sale of a chattel.

A transfer of real estate has been always a more solemn transaction. It was regulated by somewhat complicated and technical principles, which were adhered to with great exactness. In this country they are, for the most part, certainly, superseded by our statutes of conveyance and record. These require, in general, that every transfer of real estate shall be by deed, which must be entered upon a record that is open to the public. And by adjudication it has been fully determined, but not without some strong reasons to the contrary, that, as the prescribed record is intended only to give notice to a party preparing to buy the land, or take it as security, actual notice or knowledge of an unrecorded deed shall supply the want of record, and have the same effect, so far as concerns the party having such notice or knowledge.[1]

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[1] See 1 Story, Eq. Jur. § 397; Greenl. Cruise, Vol. 4, p. 452.

The English Statute of Registry of 26 Geo. 3, passed in 1786, was in force when our own statute of 1792[1] was enacted. By its 16th and 17th sections it was provided, with much minuteness, that "every alteration in the property of any ship or vessel" should be indorsed on the certificate of registry before witnesses, and should itself be registered; and that at every transfer the certificate of registry should be "truly and accurately recited in words at length in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void, to all intents and purposes." In speaking of this in Weston *v.* Penniman, 1 Mason, 317, *Story*, J., said: "To entitle ships to be registered, and to be deemed ships of the United States, with the privileges and exemptions of such ships, it is necessary that the transfer should be made according to the form prescribed in the registry acts; that is to say, that it should be made by some instrument in writing, which shall recite at length the certificate of registry; but the acts do not declare any other transfer void and illegal, but simply deny to ships transferred in any other manner the privileges of ships of the United States, and deem them alien or foreign ships. *In this respect our acts differ from the English registry acts.*"

It was remarked in a former section, that our statutes of registry copied the English statute substantially, and almost literally, with one important exception. That exception is the omission of the clauses just quoted. This is the difference to which Judge Story refers. It may be stated briefly thus. The English statute makes a transfer of a ship wholly void, if not in writing and recorded; our statute only denies to a vessel transferred without writing or registry the privileges of an American ship. It is very important to determine, if we can, the cause of this difference.

It is impossible, or at least unreasonable, to attribute this difference to accident or inadvertence. The care with which our statute is drawn, the obvious purpose and utility of every other departure from the English statute, and the better adaptation of our statute to our own wants and circumstances, by reason of those departures, forbid the supposition, if it were otherwise ad-

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[1] Ch. 1, U. S. Stats. at Large, 287.

missible, that the framers of our statute did their work with so little thought or care or knowledge as to account for this important difference in this way. These clauses must have been known to the framers of our statute.

It is equally impossible to suppose that these provisions were omitted because they were unimportant and useless, or because we did not need them as much as they did in England. It must be remembered that England had then no system whatever of recording transfers, even of land; we had already gone before her in this respect, and the utility of the change was universally admitted, throughout our country. And yet, even in England, the registry of the transfer of ships was deemed necessary, and no reason existed for it there, which did not exist in equal force here. All this, our legislators of 1792 knew; and, in addition to this, there were those among them who must have been aware of the ancient and universal rule of the law merchant, which asserts the propriety, at least, of transferring a ship by a written document. In view of all these facts, it is impossible to suppose that these important provisions of the English statute were omitted in our own, except intentionally, deliberately, and for what was at that time deemed sufficient reason.

It then becomes desirable to ascertain this reason, if we can. We think it was a doubt whether Congress had any constitutional power to enact these provisions. There is in the Constitution of the United States no provision or expression which could give Congress this power, unless it be the clause in the eighth section of the first article, which mentions, among the powers given to Congress, that which permits them "to regulate commerce with foreign nations, and among the several States." And the question is, whether a just construction of this language could authorize Congress to regulate the sale or transfer by mortgage of our own ships in our own ports. It is true that a ship is an instrument of commerce; and has no other purpose or value. But it cannot be said, that the power to regulate commerce, means a power to regulate the ownership, transfer, and evidence of title of every thing which is used in commerce.

It is true that this section closes the enumeration of powers with the general provision "to make all laws which shall be

necessary and proper for carrying into execution the foregoing powers." But this provision could not have been intended either to enlarge or to define the powers enumerated in the preceding part of the section, but only to give to those powers the fullest efficiency. Perhaps a distinction might be taken, which would bring the ship, after she was enrolled, and as it were, thus delivered up into the control of the United States, within their right to regulate the evidence of title and of transfer; and possibly this might be extended to the ship as soon as launched and completed; leaving her, previously, to the exclusive control of the State in which she belongs.

We are quite clear, that the framers of our statute of registry omitted these peculiar provisions of the English statute, because they deemed it unconstitutional to include them. And this inference is much strengthened by the fact that they did expressly and carefully provide for transfer by writing, certified and registered, so far as they were certain that these provisions related to commerce; that is, so far as related to the privileges, exemptions, or obligations of the ship while engaged in commerce; making such transfer and registry indispensable to her continuing to possess the rights of an American ship. But here they stopped. And we think that they stopped here, because they supposed that they had now exhausted all their authority on this subject derivable from the power to regulate commerce, and were, therefore, obliged to leave all that lies beyond this, as all regulation of title, transfer, and evidence of property in the ship when sold or mortgaged as mere merchandise or security, to the State government, which takes the ship up in all those relations in which it is property only.

Still it may be said, that this was the rigorous and cautious construction which would result from the principle that the Constitution was an adverse instrument, and therefore to be construed *strictly*,—but not the reasonable construction which would be justified by the supposition, that the Constitution was an instrument favorable to all parties, and should be, if not enlarged, certainly not restrained by construction; and such seems to have been hitherto the construction of this very clause, in all other cases.

But this question, which we admit to be a difficult one, has a

very great importance in its reference to the Act of 1850, ch. 27.[1] For this statute has changed, or, at least, has attempted to change, the law on this subject, very materially. It enacts, in substance, precisely those provisions which the Congress of 1792 refused to enact. As the statute is copied in the Appendix, we state here only that it declares that "no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled." It might possibly be argued that this statute meets only the case of a transfer of a ship by "bill of sale" or other "conveyance;" and therefore an oral transfer, with delivery of possession, would be as valid as it was before. We should say, however, that the word "conveyance" must be construed as equivalent to "transfer," and that such oral transfer would be void, excepting under the proviso of this statute. Under this proviso, a transfer of any kind, which before the statute was adequate to pass the property in the ship, is now perfectly valid in reference to persons having notice of it. And if the statute be, for the reasons we have presented, or for any reasons, unconstitutional, the law on this subject stands as it did before. It becomes, therefore, important to consider whether any transfer of a ship, in good faith and for valuable consideration, without writing or record, would be effectual to pass the property of the ship, either under the exception of this statute, or on the supposition that it is unconstitutional, and therefore void.

In the first place, we consider it certain that a transfer by written document is the ancient, customary, and proper way;[2] but more than this may be necessary to make it the only legal way. On this question we must begin by remembering that a ship is personal property, a chattel, capable of delivery from seller to buyer. Now the rule of the common law, which prevails

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[1] 9 U. S. Stats. at Large, 440.

[2] The Sisters, 5 Rob. Adm. 155; Weston *v.* Penniman, 1 Mason, 306.

in respect to every species of personal property, is quite certain; it is, that an oral sale for a valuable consideration, with delivery of possession, passes the property in the thing sold, absolutely, and is itself a completed transaction, which no writing, however convenient, or even requisite, on other grounds, can make more perfect. If we begin with this rule, the obvious question suggested is, whether this rule applies to shipping also; and the equally obvious answer is, that it must so apply, unless there be some rule or provision of law which makes the exception.

The earlier statutes of registration do expressly make this exception; but only for a specific and exactly defined purpose; and by a familiar rule of law this expression should exclude the implication of any further effect. This question, however, has passed under adjudication; and we have an opinion, cited before, which we regarded as authoritative, that "the registry acts have not, in any degree, changed the common law as to the manner of transferring this species of property."[1] But there may be such a rule, derived from the known and established "*Lex Mercatoria;*" and this we may gather from a sufficiently ancient, recognized, and universal custom of merchants. We do not, however, find any evidence of such a custom on this point as would have the force of law.

Undoubtedly, as has been already intimated, the usage of merchants in all nations, the repeated statements of writers of authority, and indeed the nature of the property, lead to the inference that a transfer of a ship by a written instrument of some kind is usual and proper. But further than this we cannot go, because we see no sufficient ground for saying that what may even be called the rule of practice in this behalf has anywhere, by mere usage, the force of law. We doubt whether such intimations as occur in Jacobsen's Sea Laws,[2] — that the writing is indispensable, — are to be taken as literally and exactly true.

Sometimes this is said to be the rule of the English admiralty. In much the strongest case, however,[3] Lord Stowell goes

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[1] Weston *v.* Penniman, 1 Mason, 306, 317, per Mr. Justice *Story*.

[2] Book 1, ch. 2, p. 21.

[3] The Sisters, 5 Rob. Adm. 155.

no further than to say, that "a bill of sale is the proper title, to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships, in the usage of all maritime countries; .... it is what the maritime law expects, what the court of admiralty would, in its ordinary practice, always require." But the case did not turn on this question; and these remarks are, to a certain extent, *obiter;* and if the whole case be examined it will be seen, we think, that Lord Stowell regarded the general question as an open one. Immediately after the words just quoted, he refers to the English statute of registration, which, as we have seen, requires such instrument in writing in the most positive terms, declaring, indeed, that no transfer without it shall be valid or effectual for any purpose whatsoever, in law or in equity. It cannot, therefore, be suprising to find all the English courts, whether of law or of equity, asserting that any transfer of a ship is incomplete and ineffectual, unless there be a bill of sale.[1]

They have a reason for this in the stringent provision of their own statute. We have no new reason for it here. And whether the views we have above expressed as to the reason of the difference be accepted or not, it would seem that no court in this country would be justified in supposing this difference between the American and the British statutes to be merely accidental, or in holding that the American statute was intended to express the same thing as the British, when its language is so entirely different.

It is, moreover, to be noticed that the English courts of equity seem disposed to confine the operation of this clause within strict limits. So far as the decisions of this country, out of admiralty, go, we have in the first place very positive declarations of common law courts, that the property in a ship may pass like that of any other chattel, without any instrument in writing. This would seem to settle for us the law on this subject, aside from the statutes, or from an admiralty construction or application of them. But we have in the next place, in 1817, a positive declaration by a court exercising full admiralty

[1] See *Ex parte* Halkett, 19 Ves. 474, 475; Atkinson *v.* Maling, 2 T. R. 462, 466; Sutton *v.* Buck, 2 Taunt. 302.

powers, that the United States "registry acts have not in any degree changed the common law as to the manner of transferring this species of property." [1]

Here would seem to be a plain assertion that the common law rule above stated is in admiralty the rule as to shipping. But the very next sentence is, "To be sure, a bill of sale is necessary to pass the title of a ship; but this does not depend upon any enactment peculiar to our municipal law, but grows out of the general maritime law, which requires such a document as the proper muniment of the title of the ship." It might seem that these passages are to be reconciled only by supposing that the court, by the "common law," mean to include the *lex mercatoria* or "the general maritime law" as a part of it, and that this requirement of a written instrument thus becomes a part of the common law. But, an examination of the whole case, or even of the whole paragraph in which these passages occur, would show, we think, that this was not the meaning of the court. And if it was, it was certainly an *obiter* opinion, not called for by the facts, nor by the questions raised, nor by the decision, for this distinctly sustains a merely equitable title, resting upon no bill of sale whatever. In Philips *v.* Ledley,[2] the court said: "The difference between the law of England on this point, and the law of the United States, is *striking*."

Thus far, then, we have no case in any American court, in which the rights of any party are made to depend upon this rule, or are distinctly affected by the assertion of it. But it may seem the case of Ohl *v.* Eagle Insurance Co.[3] goes this length. It involves directly the question of title to a ship. The plaintiff endeavored to maintain a title to one half of a ship by a merely oral transfer; and he was not permitted to do so. *Story*, Justice, saying, "I think that a title to a ship cannot pass by parol, when she is sold to a purchaser;" and he quotes with approbation the remarks of Lord Stowell which we have cited above. But when we look at the facts in the case, the force of the language is very much abated. We find that the plaintiff had received a bill of sale of the ship to

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[1] Weston *v.* Penniman, 1 Mason, 306, 317.
[2] 1 Wash. C. C. 226, 229.
[3] 4 Mason, 172, 390.

himself and another; and he undertook to show that the bill of sale was in fact intended to pass the property in the whole ship to him alone. But says *Story:* "The legal title passed to both; and to introduce the parol proof would be to contradict the direct allegations of the deed." This was, of course, made impossible by the most familiar rules of the law of evidence; that is, of the common law, without any reference to the law merchant. The admission of this proof would have materially varied the meaning and effect of a written instrument of title, and that a sealed instrument, by parol evidence. Only to say that this could not be permitted, would have been abundantly sufficient to decide the whole case. So far, therefore, as this case is to be regarded as authority, we must consider the preceding remark of the court as either altogether *obiter*, or as applicable only to facts like those that the court were then considering.

On the whole, therefore, and as a conclusion from all these premises, we should say that there was no case in America in which a purchaser in good faith of a ship, or a part of a ship, was dispossessed of his property by the operation of that rule; or, in other words, because the purchase, or transfer to him, had not been made by means of, or accompanied by, any written instrument. We are confident that no court of common law would ever apply this rule to such a case, and with such an effect, unless so far as they might be constrained by the Statute of 1850. That is, no court of common law would consider a written instrument absolutely indispensable, and an oral transfer without one necessarily void and of no effect whatever. And still less would a court of equity. And as a court of admiralty always possesses and exercises full equity powers, we are of opinion, that in any such case, where the equity or moral justice of the case required it, even a court of admiralty, if it considered a written instrument indispensable, would either require of the seller that he should make such instrument as the law required, or, acting upon a familiar equity principle, would consider that to be done which ought to be done, and assuming that such written instrument had been made, would protect the rights of the purchaser accordingly.[1]

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[1] That Lord *Stowell* did not intend to assert as a positive rule, that a *bill of sale* is in all cases indispensable to the transfer of property in a ship, and that he considered it a

SECTION II.

OF THE TRANSFER OF A SHIP BY BILL OF SALE.

In England, the first bill of sale, by which the property in the vessel passes from the builder to the first purchaser or owner, is

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question open to argument, appears to be the import of his concluding words in the case of The Sisters, 5 Rob. Adm. 155, 160. "Whilst Charnock was left in possession of the bill of sale, such a delivery as is here said to have taken place could not be a delivery of the title to the property. It was merely putting the property into the hands of another, for the purpose of executing a particular contract, but which contract was in fact never executed. Nothing less than an express declaration, made by Charnock to Tubbs, 'I deliver this to you for the use of Marsden,' could fairly raise the argument, how far delivery, coupled with the correspondence, could be held equivalent to a bill of sale." But see The Helena, 4 Rob. Adm. 3.

That, independently of the registry acts, no bill of sale was necessary to transfer the property in a British vessel, would seem to follow from those cases which have determined that, where these acts do not apply, the ownership may be, at least *primâ facie*, established by evidence of possession under claim of title, or other matter *in pais*, as in the case of any other chattel. Robertson *v.* French, 4 East, 130; Thomas *v.* Foyle, 5 Esp. 88; Pirie *v.* Anderson, 4 Taunt. 652; The Nostra Signora, 1 Dods. 290. See, also, Bas *v.* Steele, 3 Wash. C. C. 381; United States *v.* Amedy, 11 Wheat. 392, 409; Hozey *v.* Buchanan, 16 Pet. 215.

Under the American registry acts it is well settled, that a parol sale of a ship with delivery is good to pass the title from the vendor to the vendee, although the privileges of an American bottom are thereby forfeited. Wendover *v.* Hogeboom, Anthon's N. P. 121, 7 Johns. 308; Taggard *v.* Loring, 16 Mass. 336, 340; Lamb *v.* Durant, 12 Mass. 54; Bixby *v.* Franklin Ins. Co. 8 Pick. 86; Weaver *v.* The S. G. Owens, 1 Wallace, Jun. 359; Fontaine *v.* Beers, 19 Ala. 722; Leonard *v.* Huntington, 15 Johns. 298; Badger *v.* Bank of Cumberland, 26 Maine, 428; Vinal *v.* Burrill, 16 Pick. 401; Barnes *v.* Taylor, 31 Maine, 329; Mitchell *v.* Taylor, 32 Maine, 434.

Nor is the national character, *ipso facto*, gone by such a transfer, but the registry act makes the production of a bill of sale requisite to entitle the ship to be registered anew, and the want of such new registry forfeits the national character. If, therefore, a bill of sale is executed at any time before application made for a new registry, it is sufficient. United States *v.* Willings, 4 Cranch, 48; Hatch *v.* Smith, 5 Mass. 42, 53.

The effect of the forfeiture is not that the ship acquires the character of an alien ship for all purposes, but that she loses the privileges of an American vessel. Fontaine *v.* Beers, *supra*.

The difference in the result of a non-compliance with the terms of the registry acts in the two countries has been well established in the case of other provisions common to the acts, and classed with them and enforced by the same penalties as the requirement of an instrument in writing, thus affording a strong presumption, independent of direct authority, that this diversity extends to the clause requiring such instrument.

Thus the same section requires that the bill of sale shall "recite the certificate of

called the grand bill of sale, and is distinguished by this name from the bills of sale by which subsequent transfers are made.[1] But we have no such distinction in this country.[2] Whether any bill of sale is essential to a transfer, we have already considered. If any be necessary, — and that a transfer of a ship by a written instrument is customary and proper we have already said, and no one has ever doubted, — there is no form for one prescribed by law, or by any usage so established as to have the force of law.[3]

If a ship be mortgaged, we know no reason why it does not come under the common law, or statute law where that exists, in relation to mortgages of personal property, unless the Statute of 1850, ch. 27, interferes with and controls the State statutes. For most of our States have now statutes requiring, to make a mortgage of personal property valid, either a transfer of possession, or a record of the mortgages; and they prescribe a place for the record. But the statute of 1850 requires, that every transfer, including, of course, mortgages, should be registered in the custom-house. The questions then occur, is

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registry." And the omission of this recital has been adjudged in Great Britain to invalidate the sale, so that the vendee who had taken possession of the vessel under the bill of sale could not retain her against the assignees of the vendor, who subsequently to the sale had become a bankrupt. Rolleston *v.* Hibbert, 3 T. R. 406. And relief was denied in equity. Hibbert *v.* Rolleston, 3 Brown's Ch. 571. See, also, Campbell *v.* Thompson, 2 Hare, 140. The case is the same with an *executory* agreement to sell. Biddell *v.* Leeder, 1 B. & C. 327; Brewster *v.* Clarke, 2 Meriv. 75; Hughes *v.* Morris, 2 De G., McN., & G. 349, 12 Eng. L. & Eq. 291. So where the certificate was *misrecited*. Westerdell *v.* Dale, 7 T. R. 306. These provisions of the registry acts do not, however, extend to transfers by operation *of law*. Curtis *v.* Perry, 6 Ves. 739 a; *Ex parte* Yallop, 15 Ves. 60, 68; Bloxam *v.* Hubbard, 5 East, 407.

In America, such an omission merely forfeits the national character of the vessel. Mitchell *v.* Taylor, 32 Maine, 434; D'Wolf *v.* Harris, 4 Mason, 515, 533. So with the insufficient recital of the certificate. Philips *v.* Ledley, 1 Wash. C. C. 226, 229. So with the omission to enroll the bill of sale in the custom-house. Hozey *v.* Buchanan, 16 Pet. 215. See also, as to the distinction between the British and American registry acts, with respect to the consequences of a neglect to comply with their provisions generally. Colson *v.* Bonzey, 6 Greenl. 474, 475.

[1] Abbott on Shipping, 3. In England the grand bill of sale is necessary to the transfer of a ship at sea. Atkinson *v.* Maling, 2 T. R. 462; Gordon *v.* The East India Co. 7 T. R. 228, 234.

[2] Portland Bank *v.* Stacey, 4 Mass. 661; Wheeler *v.* Sumner, 4 Mason, 183; Morgan's Ex'rs *v.* Biddle, 1 Yeates, 3; 3 Kent, Com. 133.

[3] See the remarks of *Parke*, B., on the stat. 3 and 4 Will. 4, c. 55, § 31, in Hunter *v.* Parker, 7 M. & W. 322, 343.

the registry of the transfer in the custom-house sufficient, so that registry under the State statutes is unnecessary; or, secondly, is registry in the custom-house indispensable, or is it enough that the transfer is recorded under the State statutes. Waiving the question of the constitutionality of the Statute of 1850, which we have already considered, we are of opinion that the United States statute controls the State statute, so far, that record under this latter would have no effect as legal notice of the transfer. At least, if it be constitutional, we do not see how its requirements can be superseded or supplied by those of a State law.[1]

If the ship be abroad, by the statute of Massachusetts the record is not necessary, if the mortgagee takes possession as soon as possible after her return to that State;[2] and this would seem to be almost an inference of law, even without express provision. For if the ship be where possession cannot be taken, and possession is taken as soon as that is possible, it would hardly seem to come within the meaning or within the reason of a mortgage without possession.[3] Hence we should say that this

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[1] It is well settled that a law of Congress, which is in accordance with the constitution, is the supreme law of the land, and that a State law which comes in conflict with it must cease to operate, so far as it is repugnant to the law of the United States. License Cases, 5 How. 504, 574; Fox *v.* The State of Ohio, 5 How. 410; United States *v.* Marigold, 9 How. 560; Moore *v.* The State of Illinois, 14 How. 13; Groves *v.* Slaughter, 15 Pet. 449; Passenger Cases, 7 How. 283; Nathan *v.* The State of Louisiana, 8 How. 73; United States *v.* Peters, 5 Cranch, 115; Mager *v.* Grima, 8 How. 490; Weston *v.* City Council of Charleston, 2 Pet. 449; McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* Bank of United States, 9 Wheat. 738; Prigg *v.* The Commonwealth of Penn. 16 Pet. 539; Ogden *v.* Saunders, 12 Wheat. 213; Brown *v.* The State of Maryland, 12 Wheat. 419; Norris *v.* City of Boston, 4 Met. 282, 288; People *v.* Brooks, 4 Den. 469. See also, Port Wardens of N. Y. *v.* Cartwright, 4 Sandf. 236, opinion of *Paine*, J. It is provided by statute in New York, that a steamboat navigating the waters of that State at night shall carry *two* lights. It is also provided by an act of Congress that steamers shall carry *one or more* lights. In Fitch *v.* Livingston, 4 Sandf. 492, a steam propeller, licensed as a coaster, going up the Hudson on a voyage from Philadelphia to Albany, came into collision with another steamer, and was found by the jury to be in fault because she carried only one light. It was argued, that, having complied with the provisions of the United States statute, she had done all that was necessary, but the court held that she was bound to comply with the statute of the State through whose waters she was passing. See, however, The Steamboat New York *v.* Rea, 18 How. 223.

[2] Rev. Stats. ch. 74, § 6.

[3] This question of possession will be more fully considered in a subsequent section.

principle would apply to a mortgage of goods at sea; for, in general, all the principles which apply to the sale of the ship at sea, apply to the sale of her cargo.[1]

SECTION III.

OF THE SALE OF A SHIP BY THE MASTER.

A sale of a ship is frequently made by the master; and if this is justified by necessity, it is valid.[2] The necessity must, how-

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[1] Gardner *v.* Howland, 2 Pick. 599, 602; Pratt *v.* Parkman, 24 Pick. 42; Gallop *v.* Newman, 7 Pick. 282; D'Wolf *v.* Harris, 4 Mason, 515; Conard *v.* Atlantic Ins. Co., 1 Pet. 389, 449. Quite recently some further points have been decided in respect to this act of 1850. Thus, it has been held, that mortgages must be recorded at the custom-house where the vessel was last registered. Potter *v.* Irish, Sup. Jud. Ct., Mass., March T. 1858, 21 Law Reporter, 103. It has also been held in Admiralty that the act does not apply to charter-parties. Hill *v.* The Golden Gate, 1 Newb. Adm. 308. And by Judge Hoffman, in the Superior Court of New York City, that the act does not abolish State statutes, and, therefore, that a mortgage which is recorded according to the act of Congress, and also according to the State statute, takes precedence of a prior mortgage which is registered only according to the act of Congress. Thompson *v.* Van Veehten, Nov. 1857. But we doubt whether this be law.

In Marsh *v.* The Brig Minnie, U. S. D. C., South Carolina, 6 Am. Law Register, 328, it was held, that the lien on a vessel for supplies, was not a "hypothecation" within the meaning of that phrase in the act of 1850, and need not, therefore, be recorded.

[2] It is expressly declared by several foreign ordinances, that the master shall not sell the ship without especial authority for that purpose from the owners. He was, however, authorized to borrow money upon the credit of the ship, with the consent of his crew. Consulat, par Boucher, c. 156; Laws of Oleron, art. 1; Laws of Wisbuy, art. 13; Laws of the Hanse Towns, art. 57; French Ord. liv. 2, tit. 1.

It seems probable from the early case of Tremenhere *v.* Tresillain, Siderfin, 452, that the power of the master to sell his ship under any circumstances whatever, without instructions from the owners, was not originally recognized in England, although there is a case in Jenkins' Centuries, p. 165, which might countenance a different doctrine. It is there observed, that in case of famine a master may sell his ship, although it does not belong to him. Lord *Raymond*, in Johnson *v.* Shippen, 2 Ld. Raym. 982, considered a bill of sale given by the master void as such, but valid as a hypothecation of the vessel, upon which process *in rem* might issue in admiralty, although not *in personam*. The passage in Eakins *v.* East India Co., 1 P. Wms. 395, 2 Bro. Parl. Cas. 382, cannot be considered, as we apprehend, an authority one way or the other; for, although it is there stated that the captain had no power to sell the ship, it was also expressly found that there existed no necessity for a sale. It is now well settled by a series of decisions, that the master, in a case of *necessity*, has the power to sell. See cases *infra*. And Dr. *Lushington*, in the case of The Catherine, 1 Eng. L. & Eq. 679,

ever, be imminent and extreme; and the master must have acted in good faith, and with the exercise of a sound discretion. It is not quite easy to determine by exact definition what the power of the master is in this respect. It is certainly not enough that he acted in good faith, if the necessity were not so cogent as to give him the authority.[1] It is sometimes said also, that it is not

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681, says: "In later days I think a wiser view of the question has been taken, because I take the law now to be, that, where an urgent necessity exists, which the master cannot meet, it is competent to him to sell the vessel." But in such a case, the burden of proof lies on the purchaser to show that the sale was necessary. The Glasgow, 28 Law T. (Adm.) 13.

[1] The Fanny & Elmira, Edw. Adm. 117; Hunter *v.* Parker, 7 M. & W. 322; Cannan *v.* Meaburn, 1 Bing. 243; Meaburn *v.* Leckie, 4 Dow. & Ry. 207, n.; Idle *v.* R. Exch. Ass. C., 8 Taunt. 755; Tanner *v.* Bennett, Ryan & M. 182; Hayman *v.* Molton, 5 Esp. 65; Robertson *v.* Clarke, 1 Bing. 445. The law is stated with great accuracy by *Tindal*, C. J., in Somes *v.* Sugrue, 4 C. & P. 276: "A great deal has been said about the word *necessity*. Undoubtedly, it is not to be confined to, or so strictly taken, as it is in its ordinary acceptation. There can, in such a case, be neither a legal necessity, nor a physical necessity, and therefore it must mean a *moral* necessity; and the question will be, whether the circumstances were such, that a person of prudent and sound mind could have a doubt as to the course he ought to pursue. The points principally for consideration will be, the expenditure necessary to put the ship into a condition to bring home her cargo; the means of performing the repairs, and the comparison between those two things, and the subject-matter which was at stake; and it must not be a mere measuring cast, not a matter of doubt in the mind, whether the expense would or would not have exceeded the value; but it must be so preponderating an excess of expense, that no reasonable man could doubt as to the propriety of selling under the circumstances, instead of repairing. . . . . A captain has no power to sell, except from necessity, considered as an impulse, acting morally, to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. If he has no means of getting the repairs done in the place where the injury occurs; or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is justified in selling, as the best thing that can be done." And in this country the same rule exists; the sale must not only be *bonâ fide*, but the necessity for it must exist. Pope *v.* Nickerson, 3 Story, 465, 504; Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; The Brig Sarah Ann, 2 Sumn. 206, s. c. New Eng. Ins. Co. *v.* Brig Sarah Ann, 13 Pet. 387; The Sch. Tilton, 5 Mason, 465.

The necessity which will justify the sale is termed by *Shaw*, C. J., an "imperious, uncontrollable necessity." Peirce *v.* Ocean Ins. Co., 18 Pick. 83, 88. In Somes *v.* Sugrue, *supra*, and in Pope *v.* Nickerson, 3 Story, 465, 504, it is called a moral necessity. Mr. Justice *Story*, in the case of The Ship Fortitude, 3 Sumn. 228, 248, thus defines the meaning of *moral necessity:* "Some criticism has been employed upon the words 'moral necessity' as applied to the conduct of the master acting in cases of this sort; and it has been more than intimated, that the expression is quite new, and can scarcely be traced beyond the case of Gordon *v.* Mass. F. & M. Ins. Co., 2 Pick. 249. It does not appear to me that the criticism has any just foundation, or that the expression is either new or inapt. It seems to indicate precisely that which such a case requires. Moral necessity arises, where there is a duty incumbent upon a rational being to per-

enough that he sells in the exercise of a sound discretion, because the danger must be actual. But it is quite certain that the validity of the sale is not to be judged of by the event. That may show that the danger was apparent only, because the first tide, or an immediate change of wind, lifted her off.[1]

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form, which he ought at the time to perform. It presupposes a power of volition and action, under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming, superior force." And in Hall *v.* Franklin Ins. Co. 9 Pick. 466, it is said: "The sale should be indispensably requisite. The reasons for it should be cogent. We mean a necessity which leaves no alternative; which prescribes the law for itself, and puts the party in a positive state of compulsion to act." The master may sell where the ship is a total wreck. Cambridge *v.* Anderton, 2 B. & C. 693; Ireland *v.* Thompson, 4 C. B. 149. Or, in an insurance case, if the expense of repairs would exceed the value of the vessel when repaired. Gordon *v.* Mass. F. & M. Ins. Co., 2 Pick. 249. See also, on this point, the remarks of Mr. Justice *Bayley*, in Gardner *v.* Salvador, 1 Moody & R. 116. "If the situation of the ship be such, that, by no means within the master's reach, it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship, he cannot, by selling, turn it into a total loss." The master's opinion of the necessity, and the benefit resulting from the sale, and his professional skill, will not justify him in the absence of a real necessity. Patapsco Ins. Co. *v.* Southgate, *supra;* The Henry, 1 Bl. & Howl. Adm. 465. The presumption however is, that he has done his duty. Robinson *v.* Com. Ins. Co. 3 Sumn. 220. In Post *v.* Jones, 19 How. 150, the vessel was wrecked on the coast of Behring's Straits. The cargo, consisting of barrels of oil, was taken out and saved by three other whaling ships. The form of an auction was gone through with, the captains of the three vessels being the bidders, and the ship and tackle were sold for five dollars, and the cargo, part at a dollar, and the rest at seventy-five cents per barrel. The sale was held invalid. The court said: "All the cases assume the fact of a sale in a civilized country where men have money, where there is market and competition. They have no application to wreck in a distant ocean, where the property is derelict, or about to become so, and the person, who has it in his power to save the crew, and salve the cargo, prefers to drive a bargain with the master. The necessity in such a case may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise this power."

[1] The Brig Sarah Ann, 2 Sumn. 206, 215; affirmed on appeal, New Eng. Ins. Co. *v.* Brig Sarah Ann, 13 Pet. 387. Mr. Justice *Wayne*, delivering the opinion of the court in this case, said: — "Nor can the necessity for a sale be denied, when the peril, in the opinion of those capable of forming a judgment, makes a loss probable, though the vessel may in a short time afterwards be got off and put afloat. It is true, the opinion or judgment of competent persons may be falsified by the event, and that their judgment may be shown to have been erroneous by the better knowledge of other persons, showing it was probable that the vessel could have been extricated from her peril without great injury or incurring great expense, and the master's incompetency to form a judgment or to act with a proper discretion in the case may be shown. But from the mere fact of the vessel having been extricated from her peril, no presumption can be raised of the master's incompetency, or of that of his advisers." See also Idle *v.*

If, however, we understand by actual danger the actual probability of destruction, as far as that could then be measured or estimated, then, it is true that the authority of the master to sell springs only from a necessity which is caused by actual danger; for danger is one thing, and destruction another; from danger there may be escape, and this may even be swift and easy, and yet the danger have been real and great.

The rule must be, that, if the circumstances were such that if any master of ordinary skill and intelligence, carefully observing all the facts, and weighing all probabilities, would be led to the conclusion that an escape from destruction was but little more than possible, and that a delay sufficient to acquaint his owners with his condition and receive their instructions would in all probability cause a greater loss, he may then sell.[1]

We may be guided, in applying this rule to any case, by inquiring what any owner of common character and intelligence would have done if present; not always what that identical owner would have done, because a peculiarity of temperament might make him hope too long or despair too soon. The ship must not, we repeat, be sold on a mere expediency; or because that may turn out to be the best course. But if it is quite certain that any owner of common understanding and acquaintance with ships and navigation, being on the spot and conusant of all the facts, would conclude that the only thing left for a prudent man to do was to sell the ship at once, then the master may sell.[2]

Royal Ex. Ass. Co. 8 Taunt. 755; Fontaine *v.* Phœnix Ins. Co. 11 Johns. 293; Hall *v.* Franklin Ins. Co. 9 Pick. 466, 484; The Henry, 1 Bl. & Howl. Adm. 465.

[1] See post, p. 64, n. (2) and (3).

[2] Where the master sells the ship, and the question of the validity of the sale is disputed by the former owner, so that the only question is between him and the vendee, it is clear that the sale will be deemed valid, if the circumstances attending it were such that a jury would be warranted in finding that a prudent owner would have done as the master did. Hayman *v.* Molton, 5 Esp. 65. But we are not disposed to carry the doctrine of "prudent uninsured owner" further than this. And in a case of insurance, we should say, that, in judging of the necessity of the sale, what a prudent owner uninsured would have done, if present, should not be considered. We are aware that this is said to be a test, in numerous cases; but to show the fallacy of it let us take the case of 'memorandum articles,' where the rule is that if the goods arrive in specie there is no total loss. Now, probably in every case, the best thing that can be done is to sell the

Whether the mere want of funds can be of itself a sufficient necessity to justify a sale by a master has been much disputed.[1] But we strongly incline to the conclusion, that a master can have no power *from necessity* to sell a ship that is not a wreck. It is true that the master may have no funds with him, and that his owners may not be known, or their pecuniary responsibility ascertained where his ship needs repair; but it is not easy to imagine a place where extensive repairs could be made, and yet no money be raised on bottomry of the ship. To meet this very emergency, the law and custom of bottomry are universal. If the requisite repairs would cost so much that the ship, when repaired, would not suffice as security for the sum, then the greatness of the injury, as measured by this cost, might be equivalent to a wreck, and on this ground justify a sale. If the injury be less, so that a comparatively small sum would repair her, but that cannot be raised, then it is a question whether the master should sell at once, or delay the sale until orders can be received from the owners. And, although there may be peculiar cases and emergencies, which must be judged of by themselves, as a general rule we should have no hesitation in saying, that the master of a ship thus slightly injured would have no other right than to let her lie in port, with all possible precaution against deterioration, until he could hear from his owners.[2] There may be, perhaps, a case in which the master may be justified in selling by a mere *pecuniary* necessity; but this must be extreme and unquestionable; it must be such as to come clearly within the rule already laid down, and make it indisputably certain that the

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goods; but it is certain that this will not be taken as a criterion. As we shall have occasion to discuss this question at length in that part of this work which treats of insurance, we merely make these suggestions here.

[1] This point came up in the case of the American Ins. Co. *v.* Ogden, 15 Wend. 532. The master of the ship, on her arrival in a damaged condition at the port of *destination*, finding himself without funds and without credit, and being unable to raise money for the purpose of repairs, either by bottomry or otherwise, sold the vessel, although the loss was neither actually nor technically a total one. This was held by a majority of the court, (*Bronson*, J., dissenting,) to justify an abandonment by the owners. The decision was reversed in the Court of Errors, 20 Wend. 287, on the ground that the want of funds was owing to the default of the owner, who could not make a loss arising from his own fraud or neglect the means of charging the insurers, but the conduct of the master in selling was declared to be entirely justifiable, p. 306, 319.

[2] See post, p. 64, n. (2) and (3).

owner himself, if there under similar circumstances, would have found a sale the only thing he could do; for, it must be such as to show that the sale was *clearly* of *necessity*, and not of *expediency* only.

At one time, a distinction was made between the power of the master if abroad, or if wrecked on the coast of his own country.[1] But this has disappeared. The only rule now is, that he must inform his owners, and wait their instructions, if he can.[2] The general introduction of the electric telegraph will much extend this possibility, and consequent duty. For, let the master be where he may, and his owner far or near, it is certain that he can only dispossess the owner of his property by a sale, when his authority for this rests on necessity, and only when that necessity is such as to preclude intercourse between them without an unreasonable exposure of the property to peril. In other words, if he can become the agent of the owner with instructions, then he cannot be his agent from necessity.[3]

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[1] Scull *v.* Briddle, 2 Wash. C. C. 150.

[2] The Brig Sarah Ann, 2 Sumn. 206, 215. In this case, Mr. Justice *Story* states the law as follows: "It has been suggested at the argument, that, as the stranding was on a home shore, at no great distance from the residence of the agent of the owners, the master was not authorized to sell without consulting the agent or the owners. I agree at once to the position, if there is no urgent necessity for the sale. But if such an urgent necessity does exist, as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore, or on a foreign shore, whether the owners' residence be near or be at a distance. I am aware of the doctrine maintained by my brother, the late Mr. Justice *Washington*, in Scull *v.* Briddle, 2 Wash. C. C. 150; and, unless it is to be received with the qualification above stated, I cannot assent to it." Same case affirmed, New Eng. Ins. Co. *v.* Brig Sarah Ann, 13 Pet. 387.

[3] In Pike *v.* Balch, 38 Maine, 302, a vessel on a voyage from Calais, Maine, to New York, was wrecked on an island off Little Machias Bay. There was a telegraph station distant twenty miles from the wreck. It was held, that if the master could "by any available means" in his power communicate with his owners, he was bound to do so. The vessel was sold by the master without notice being given to the owners, and the sale was held to be invalid. And in the New England Ins. Co. *v.* Brig Sarah Ann, 13 Pet. 387, 401, the court say: "The true criterion for determining the occurrence of the master's authority to sell is the inquiry, whether the owners or insurers, when they are not distant from the scene of stranding, can by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel in time to direct the master before she will probably be lost. If there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit of all concerned, though but little may be saved." See also The Brig Sarah Ann, 2 Sumn. 215; Scull *v.* Briddle, 2 Wash. C. C. 150. In Hall *v.*

If a sufficient necessity existed, and the master proceeded to make sale, he does so as the agent of the owners, and binds them by his acts or words in the same manner that he would if otherwise authorized to make the sale.[1]

SECTION IV.

OF THE SALE OF A SHIP UNDER A DECREE OF ADMIRALTY.

The ship is sometimes sold, abroad or at home, under a decree of the court of admiralty. If this be a condemnation as prize, or for forfeiture as contraband, or for smuggling, or for any such cause, or to pay salvage, or discharge a bottomry bond, or to satisfy any of the liens known to the maritime law, it would seem to be valid and binding upon all courts and all parties, unless it be shown to be vitiated by fraud.[2] But if it be merely a decree on a survey, and rest on the ground of unfitness for service, or unseaworthiness, then it would seem that the courts of the country in which the ship belongs will look behind the judgment in admiralty, receiving the decree as of little more authority than the report of surveyors, or a similar statement, on the authority of which it probably rests. And the sale will then be valid or void, accordingly as the actual facts shall show it to have been necessary and justified, or the opposite.[3] The courts

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Franklin Ins. Co. 9 Pick. 466, the ship was in no immediate danger of becoming a wreck. It would have taken thirty or forty days to have communicated with the underwriters, and to have received word back. The vessel being sold without notice of her condition being given, the sale was held to be void. See also Peirce *v.* Ocean Ins. Co. 18 Pick. 83.

[1] Woods *v.* Clark, 24 Pick. 35.

[2] The Tremont, 1 W. Rob. 163; Attorney-General *v.* Norstedt, 3 Price, 97; The Helena, 4 Rob. 3.

[3] In Reid *v.* Darby, 10 East, 143, Lord Ellenborough remarked, of the exercise by admiralty courts of this jurisdiction: "No instance has been discovered, in which such a power has been exercised in the admiralty court at home; nor can we find any terms in the vice-admiralty commission, or any principle upon which that practice can be sustained, (which certainly, however, has obtained in the vice-admiralty courts abroad,) of decreeing, upon the mere petition of the captain, the sale of a ship reported upon survey to be unseaworthy and not repairable, so as to carry the cargo to the place of its destination, but at an expense exceeding the value of the ship when

of the United States have asserted that this subject is within the general jurisdiction of admiralty, and that such a decree may be made. And there are intimations, perhaps, that such a decree would be the best protection of a master, and that it would be wise in him, therefore, to obtain it. It might be inferred from this, that they would consider such a decree of a foreign court of the same force as a decree of condemnation. But we are of opinion that they would not only inquire into the foundation on which such decree was founded, and into all facts bearing upon the question of jurisdiction, but also into the distinct question whether the facts connected with the condition of the ship were such as justified the decree.[1]

The practice of selling by decree of admiralty merely for unseaworthiness is not much known in this country, and the rule

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repaired." The same doctrine is reaffirmed in Hunter *v.* Prinsep, 10 East, 378; Morris *v.* Robinson, 3 B. & C. 196, 203. The English court of admiralty, though they admit, yet regret, the want of jurisdiction. The Fanny and Elmira, Edwards' Adm. 117, 119; The Warrior, 2 Dods. 288, 293; The Pitt, 1 Hagg. Adm. 240.

1. Thus, Mr. Justice *Story*, in the case of the Schooner Tilton, 5 Mason, 465, 474, says: "To what is suggested in that case, (Reid *v.* Darby,) as to the want of jurisdiction in the admiralty courts to decree the sale of a ship in a case of necessity upon an application of the master, I, for one, cannot assent. I agree, that in such a case the decree of sale is not conclusive upon the owner or upon third persons, because it is made upon the application of the master, and not in an adverse proceeding. But I cannot but consider it as strictly within the admiralty jurisdiction. It is *primâ facie* evidence of a rightful exercise of authority, but no more. The proceeding, being *ex parte*, cannot be deemed conclusive in favor of the party promoting it." See also Janney *v.* Columbian Ins. Co. 10 Wheat. 411, 418; Dorr *v.* Pacific Ins. Co. 7 Wheat. 581; Armroyd *v.* Union Ins. Co. 2 Binn. 394; Steinmetz *v.* United States Ins. Co. 2 S. & R. 293; The Dawn, Ware, 485, 487.

In Grant *v.* M'Lachlin, 4 Johns. 34, an American vessel was captured by a French privateer, and carried into port, but was never condemned as a prize. Subsequently she was employed by the French government to carry passengers to Barracoa, and arrived there in a dismantled condition. After remaining there several months, she was sold by order of the Spanish commissary, and got off and repaired. She subsequently arrived in New York, where her original owners brought an action of trover against the vendee. The court held that the sale was fair and *bonâ fide*, and, being made in accordance with the laws of Spain, was binding on all parties. Mr. Justice *Thompson* said: "A sale according to the law of the place where the property is must vest a title in the purchaser, which all foreign courts are bound, not only from comity, but on strong grounds of public utility, to recognize. Without this rule, there could be no safety in derivative titles. The only inquiry in these cases is, Was the sale under a competent authority?" Where a sale is made by the advice of surveyors, it is *primâ facie* valid, and the burden of proof is on the party seeking to impeach it. Gordon *v.* Mass. F. & M. Ins. Co. 2 Pick. 249, 265.

which permits such a decree to be examined into so freely is an exception to the general rule, which makes a decree of admiralty *in rem* binding upon all the world. But the reason of this rule in some degree qualifies it. The reason is, that all persons who have an interest in the property may interfere to protect it; but, in order that they may do this, there must be proper notice given, and reasonable opportunity afforded to them to assert and maintain their claims. Probably it would never be a sufficient reason for setting aside a decree of a foreign court of admiralty, that the person who seeks to avoid it had not actual notice or opportunity to present his rights and claims before the court, provided the usual notice and opportunity were given generally, and these were such as would import or carry with them a sufficiency of notice. But if these were wanting, if the proceedings were hastened, or so conducted that all persons interested would be in fact exposed to be deprived of their property unheard, this would taint the decree, and might have the full effect of fraud upon it.[1] So if the property sold were never within the possession or reach of the court, either actual or constructive, or if the question upon which the case depended was not within their

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[1] Sawyer *v.* Maine F. & Mar. Ins. Co. 12 Mass. 291; The Mary, 9 Cranch, 126. In Bradstreet *v.* Neptune Ins. Co. 3 Sumn. 600, 607, Mr. Justice *Story* is very explicit upon this point. He says: "If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal, which first punishes and then hears the party — *castigatque, auditque.* It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples underfoot all the doctrines of international law; and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem*, that some specific offence is charged, for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that the parties in interest may appear and make defence; and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs."

jurisdiction, this would show the proceedings to be either grounded upon a fatal mistake, or upon intentional fraud. But this possession may, as it is now settled, be constructive; for both the English and the American admiralty will, as we shall state more fully in another part of this work, condemn as prize a captured ship which has been carried into a neutral port, and is lying there at the time of the decree.[1]

The court must be a regular court, such as is recognized by the law of nations. It is settled, at least for England and America, that the sufficiency and authority of the court, as well as its jurisdiction, may be inquired into.[2] And the courts of neither country acknowledge the authority of a consul, nor, indeed, of any other person, sitting as judge in a neutral port under a commission from his own country.[3]

If a ship has been wrecked in a foreign port, and there abandoned, and thereupon the government of that country sell the ship according to the laws thereof, a purchaser in good faith takes a good title.[4]

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[1] The Christopher, 2 Rob. Adm. 207; The Henrick & Maria, 4 Rob. Adm. 43, 54; affirmed on appeal, 6 Rob. Adm. 139 *n.*; The Falcon, 6 Rob. Adm. 194; The Comet, 5 Rob. Adm. 285; The Victoria, Edwards' Adm. 97; Hopner *v.* Appleby, 5 Mason, 71; The Arabella and The Madeira, 2 Gall. 368; Cheriot *v.* Foussat, 3 Binn. 220. But see Wheelwright *v.* Depeyster, 1 Johns. 471, *contra*.

[2] The Flad Oyen, 1 Rob. Adm. 135; The Henrick & Maria, 4 Rob. Adm. 43; Assievedo *v.* Cambridge, 10 Mod. 77; Hudson *v.* Guestier, 4 Cranch, 293; Rose *v.* Himely, 4 Cranch, 241; Cheriot *v.* Foussat, 3 Binn. 220; Wheelwright *v.* Depeyster, 1 Johns. 471; Snell *v.* Faussatt, 1 Wash. C. C. 271; Francis *v.* Ocean Ins. Co. 6 Cowen, 404; Ocean Ins. Co. *v.* Francis, 2 Wend. 64; Cucullu *v.* Louis. Ins. Co. 17 Mart. 464; Bradstreet *v.* Neptune Ins. Co. 3 Sumn. 600, 605; Turnbull *v.* Ross, 1 Bay, 20.

[3] The Flad Oyen, 1 Rob. Adm. 135; The Kierlighett, 3 Rob. Adm. 96; Havelock *v.* Rockwood, 8 T. R. 268; Wheelwright *v.* Depeyster, 1 Johns. 471.

[4] Grant *v.* M'Lachlin, 4 Johns. 34. In the case of the Schooner Tilton, 5 Mason, 465, the vessel being wrecked on the coast of North Carolina, was sold by a wreck-master as she lay, under the laws of this State; and *Story*, J., said, p. 479: "Where the sale is made by a wreck commissioner in cases falling within the language of the law, 'without any person present to claim the same as owner,' a very different interpretation ought, as I conceive, to be given to his act. He is there made *virtute officii*, the agent of the owner for public purposes, and his authority to sell, if exercised in good faith, is conclusive to transfer the property to any purchaser at the sale. . . . . Such a sale, however, though generally conclusive upon the title of the owner, is so only in cases of good faith. A statute sale by a public officer may be impeached, as, indeed, more solemn acts may be, for fraud; and the purchaser can protect himself only by showing that he is a *bonâ fide* holder, without notice of, or participation in, the fraud. *A fortiori*, a sale made by the consent of the owner or his agent may be avoided for fraud."

SECTION V.

HOW FAR THE COMMON RULES RESPECTING THE SALE OF A CHATTEL APPLY TO THE SALE OF A SHIP.

1. *As to the Rules of Evidence and Agency.*

The common rules as to evidence, agency, warranty, and the like, in respect to sales of personal property, apply to the sales of a ship. Thus, for example, if a ship is ordered to be built for a particular purpose, there is an implied warranty that she shall be fit for that purpose.[1] So, also, the rule of *caveat emptor* applies.[2] But material representations, made to affect the sale, and doing this, have much the same effect as warranty.[3] If, however, the contract of sale be reduced to writing, it would, generally at least, be very difficult to add new stipulations, or introduce representations and assertions, merely by oral evidence.[4] If the ship be sold, as is done more often abroad than in this country, "with all her faults," this was once held to make it obligatory on the seller to disclose a fault which the buyer could not possibly ascertain.[5] The later and prevailing doctrine seems to be, that the seller may, under such a sale, be silent as to any or all the faults which he knows, without any reference to the buyer's ability to discover them; but he must not be *active* in

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[1] See Shepherd *v.* Pybus, 3 Man. & G. 868; Chambers *v.* Crawford, Addison, 150. In Cunningham *v.* Hall, U. S. Dist. Ct., Mass., March, 1857, the respondent built a vessel for the libellant. During the first voyage she leaked constantly, and at the end of it her copper was taken off, and it was found that the leak was owing to a defective plank. An action was brought against the builder to recover the expenses incurred in making the repairs, and for demurrage. Held, that there was an implied warranty on the part of the builder to furnish a sea-worthy vessel, and he was, therefore, liable for all damages resulting from his breach of the contract.

[2] But the law of Louisiana imposes upon the seller the obligation of warranting the vessel sold against its hidden defects, which are those which could not be discovered by simple inspection. Bulkley *v.* Honold, 19 How. 390.

[3] Schneider *v.* Heath, 3 Campb. 506; Shepherd *v.* Kain, 5 B. & Ald. 240. See, however, Dyer *v.* Lewis, 7 Mass. 284.

[4] Pickering *v.* Dowson, 4 Taunt. 779; Freeman *v.* Baker, 5 B. & Ad. 797, 5 C. & P. 475; Kain *v.* Old, 2 B. & C. 627; Mumford *v.* M'Pherson, 1 Johns. 414.

[5] Mellish *v.* Motteux, Peak. Cas. 115.

concealing them, for this is a positive fraud.[1] The rule cannot be better illustrated than by the old dictum in Rolle's Reports; if one sells a blind horse, he is not held without warranty; but

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[1] In Baglehole *v.* Walters, 3 Campb. 154, the bill of sale contained the words, "in excellent condition;" but it does not appear whether or not the defects alleged by the vendee were such as to render such a description materially incorrect, and no notice is taken of this circumstance by the court. "I cannot," said Lord *Ellenborough*, "subscribe to the doctrine of Mellish *v.* Motteux, (*supra*,) although I feel the greatest respect for the authority of the judge by whom it was decided. Where an article is sold 'with all faults,' I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and apparent. . . . . It would be most inconvenient and unjust, if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, I think there is no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults." See, also, Schneider *v.* Heath, 3 Campb. 506. If a ship is represented to have been built in a certain year, whereas she was launched the year previous, the buyer may recover damages for the deceit, though she was sold with all her faults. Fletcher *v.* Bowsher, 2 Stark. 561.

And where the ship was described in the bill of sale as "copper fastened," whereas she was in reality only partially so, and not what was known in the trade as a copper fastened vessel; this was considered a breach of warranty. "With all faults," say the court, "must mean with all faults which it may have consistently with its being the thing described. Here the ship was not a copper fastened ship at all." Shepherd *v.* Kain, 5 B. & Ald. 240.

Where the bill of sale represented the vessel to be of greater dimensions and burden than she really was, it was held that the vendee could not maintain case against the vendor for false affirmation and promise. Dyer *v.* Lewis, 7 Mass. 284. The court do not seem to have considered this description as in the nature of a warranty. See also *post*, ch. 8, sect. 2. So in a late English case, 5 Exch. 779, Taylor *v.* Bullen, 1 Eng. L. & Eq. 472, where the ship was described as "the fine teak built bark Intrepid, A No. 1, well adapted for a passenger ship," and the document concluded with the words, "to be taken with all faults, without any allowance for deficiency, etc., or any defect or *error* whatsoever. The plaintiff declared on a breach of warranty, alleging that the ship was not "teak built," nor A No. 1, nor well adapted for a passenger ship. The court were of opinion that this was not a warranty of any thing more than that the vessel in question was a *bark*, and that all errors of description were protected by the clause, "without allowance for any error." Shepherd *v.* Kain was admitted by the court to be correct, but it was held that the words at the bottom of the memorandum were used for further protection.

This knowledge of the vendor of the existence of the defects, we have seen, is immaterial, if he use no deceit in order to conceal them, and evidence of parol representations as to the condition of the ship is not generally admissible where there is a bill of sale; but where these two circumstances concur, that is, where the vendor knowingly makes such misstatements, this we presume would be conclusive evidence of fraud, sufficient to vitiate the bill of sale. See the cases, *supra*.

if he sells a horse whose missing eye is supplied by a glass eye, he is liable for the deceit.[1]

2. *What are the Appurtenances of a Ship.*

How much passes by the word "ship," or the phrase "ship and her appurtenances, — or apparel, — or furniture," — or the like, cannot be positively determined by any definition. Stowell and Abbott agree, that whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances, within the meaning of the English statute of 53 Geo. 3, c. 139.[2] To define what would pass by these, or similar words, in a sale, we should add to this definition some expressions denoting that the thing in connection was distinctly connected with the ship and the proper use of her. Usage would have much effect in deciding this question; and it is obvious that things may be part and parcel of a "ship" at one time and place, and under some circumstances, and not at others. In the note we show all that has been done to define the term by adjudications.[3]

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[1] Southerne *v.* Howe, 2 Rol. R. 5. "*Si home vend chivall que est lame null action gist peur ceo, mes caveat emptor; lou jeo vend chivall que ad null oculus la null action gist; autrement lou il ad un counterfeit faux et* Bright Eye." These words have generally been understood as in the text; but Mr. Oliphant, in his work on Horses, p. 73, says: "Probably by 'Bright Eye' is meant 'glass eye,' or *gutta serena*, (which is a palsy of the optic nerve, and very difficult to detect,) and the words, 'counterfeit et faux' may be an attempt of the reporter to explain an expression which he did not understand. Because putting a glass eye into a horse is very far in advance of the sharpest practice of the present day, or of any former period." This seems reasonable; and then the case cannot be cited to illustrate the law of sale as stated in the text, which, however, rests upon sufficient reason.

[2] The Dundee, 1 Hagg. Adm. 109; Gale *v.* Laurie, 5 B. & C. 156.

[3] In Kynter's Case, 1 Leon. 46, it was decided by the court, that *ballast* was not included in the furniture appertaining to a ship, on the ground that the ship may sail without it, as where the cargo serves instead. And this seems to be the reason assigned by Lord *Ellenborough*, in a modern case, Lano *v.* Neale, 2 Stark. 105, for holding that iron kentledge, (pigs of iron cast into a particular form for ballast, see McCulloch's Dictionary of Commerce, under "Kentledge,") was not included in a bill of sale of a ship with all her stores, tackle, apparel, etc., in the usual form, because, said his lordship, "it could not be considered as part of the ship or necessary stores, since common ballast might have been used." So in Burchard *v.* Tapscott, 3 Duer, 363, where the bill of sale conveyed the vessel with her masts, bowsprit, sails, boats, anchors, cables, and all other necessaries thereto appertaining and belonging, it was held, that ballast of any

A ship would undoubtedly remain and continue to be the same ship, however extensively or frequently repaired; and even

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kind whatsoever, on board at the time of the sale, would not pass as a necessary appurtenance to the ship. It would seem to be deducible from these cases, that nothing is to be considered an appurtenance of a ship, unless requisite to its proper use, although connected with it at the time.

In Hoskins *v.* Pickersgill, 2 Marsh. Ins. 727, Lord *Mansfield* was of opinion, that the *boats*, rigging, and stores were included in the insurance on a whaling ship, her tackle, furniture, etc.; but as to the fishing lines, tackle, and stores, the question must depend upon the usage of the trade. The jury negatived the existence of this usage; and when the case came up on motion for a new trial, the judges were unanimous that they were not part of a *ship's* tackle or furniture. Park. Ins. (8th edit.) 126. That *provisions*, put on board for the use of the crew, are protected by a policy on the ship and furniture, was considered as well settled in Brough *v.* Whitmore, 4 T. R. 206. But as to the *boat*, which Lord Mansfield likewise included, there seems to exist more uncertainty. Both Molloy, B. 2, ch. 1, § 8, and Beawes, p. 56, hold that in the sale of a ship, etc., the boat does *not* pass, and the point was determined the same way in an early case, in this country. Starr *v.* Goodwin, 2 Root, 71.

On the other hand, in Briggs *v.* Strange, 17 Mass. 405, a boat, cable, and anchor seemed to have been classed together, both by counsel and court, as appurtenances of a ship, which could not be separated from her, so long as they were requisite to her use and safety, but might be attached by the sheriff, when the vessel was at the wharf and stood in no need of them. See also Roccus, n. 20; Straccha de Navibus, Pars 2, No. 12. In a policy of insurance, the word ship usually includes the boat. Hall *v.* Ocean Ins. Co. 21 Pick. 472; Emerig. c. 6, § 7, Meredith's Ed. 143. See also Shannon *v.* Owen, 1 Man. & R. 392.

So a rudder and cordage purchased for a ship are part thereof. Woods *v.* Russell, 5 B. & Ald. 942. In Goss *v.* Quinton, 3 Man. & G. 825, A ordered a rudder to be made for his ship. The ship-builder began to work upon it, and stated that it was for A. This fact was not communicated to A till after the bankruptcy of the builder, which took place while the rudder was yet unfinished. A, being then informed that the rudder was intended for him, took it away. Held, that the property was in him. This case is, however, doubted in the Exchequer Chamber in the case of Wood *v.* Bell, 25 L. J. Q. B. 321, 36 Eng. L. & Eq. 148, where it was held, that materials which had been fitted to and formed part of the ship would pass, even though they were not attached to the ship, but that those which had merely been bought for the ship, and intended for it, would not pass. *Jervis*, C. J., said: "Nothing that has not gone through the ordeal of being approved as part of the ship, passes, in my opinion, under the contract." This decision overrules, in part, the same case in the Queen's Bench, 5 Ell. & Bl. 772, 34 Eng. L. & Eq. 178. See also Baker *v.* Gray, 17 C. B. 462, 34 Eng. L. & Eq. 387. In The Alexander, 1 Dods. 278, a question arose whether a bottomry bond on the ship, her tackle, apparel, furniture, etc., could be enforced against the sails and rigging, which had been, according to the custom of the port, detached from the vessel for safe-keeping, and with the view of being returned to the ship when she was about to sail. The court held that it could.

In the case of The Dundee, 1 Hagg. Adm. 109, Lord *Stowell* decided that the *fishing stores* of a vessel engaged in the Greenland fisheries were *appurtenances* of the ship within the meaning of 53 Geo. 3, c. 159, restricting the liability of ship-owners in cases of loss to the value of the ship, freight, etc. "The word *appurtenances*," said he,

if at last all her original materials had disappeared.[1] So, if she were taken to pieces with intent to reconstruct her and this was

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"is a word of wider extent than *furniture*, and may be properly applied to many things that could not be *so* described (with propriety, at least) in a contract of insurance. It may not be a simple matter to define what is, and what is not, an appurtenance of a ship. There are some things that are *universally* so, things which must be appurtenant to every ship, *quà* ship, be its occupation what it may. But, I think it is rather gratuitously assumed that particular things may not become so, from their immediate and indispensable connection with a ship, in the particular occupation to which she is destined, and in which she is engaged. A ship may have a particular employment assigned to her, which may give a specialty to the apparatus that is necessary for that employment. . . . . The word 'appurtenances' must not be construed with a mere reference to the abstract, naked idea of a ship; for that which would be an incumbrance to a ship one way employed, would be an indispensable equipment in another, and it would be a preposterous abuse to consider them alike in such different positions. You must look to the relation they bear to the actual service of the vessel."

This decision was affirmed in the Court of King's Bench. Gale *v.* Laurie, 5 B. & C. 156, where it came up on a declaration in prohibition. *Abbott*, C. J., however, makes a distinction between the use of the word in the statute and in contracts of insurance, which renders it doubtful whether such stores would pass under a bill of sale of a ship, etc., and leaves it to be determined by usage. "We think," he says, (p. 164,) "that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act, whether the object be warfare, the conveyance of passengers or goods, or the fishery. This construction furnishes a plain and intelligible general rule; whereas, if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and much discussion and cavil. It is true, that, in the case of insurance, these stores are not considered as covered by an ordinary policy on the ship. But insurance is a matter of contract, and the construction of the contract depends in many cases upon usage. And the construction of a policy can furnish no rule for the construction of this act of parliament, which was passed for purposes of a different nature."

The *cargo* of a whaling vessel does not pass by a bill of sale of the ship, stores, and *their appurtenances*. Langton *v.* Horton, 5 Beav. 9, 23 Legal Observer, 524.

A *chronometer* belonging to the owner, which was on board at the time of the sale, was held to pass by the sale of the ship, the vessel being then at sea. s. c. 6 Jurist, 910. But in a similar case in Maine, the bill of sale was held, in the absence of any agreement of the parties or usage of trade shown, not to include the chronometer as an appurtenance of the ship, Mr. Justice *Emery* remarking, however, "We do not intend to decide but what, in the improvements of nautical science, chronometers may become necessary appurtenances to ships." Richardson *v.* Clark, 15 Maine, 421, 425.

[1] Emerigon, in his treatise on Insurance, ch. 6, § 7, Meredith's Ed. 144, says: "A ship is always presumed the same, though all the materials which at first had given it existence have been successively changed: *Navim, si adeo sæpe refecta esset, ut nulla tabula eadem permaneret, quæ non nova fuisset, nihilominus eandem navim esse existimari.* The Athenians preserved the galley of Salamis, during more than 1,000 years, from

done. But it is said, that, if taken to pieces without this intent and afterwards reconstructed in part, she is a new ship.[1]

3. *Of the Sale of a Ship by the Builder.*

The builder of a ship is its first owner. It is true, that a party might contract with a builder to perform all the labor upon materials which that party would supply, and then the ship would belong to him for whom it is built, from the beginning, and would never be the builder's. But this is never done in practice. The ship-builder constructs the vessel either upon an order, or a contract for building or sale, or to sell it to any purchaser who may offer, or to own it himself. But it is possible, that the contract for building and sale may be such as to make the ship become the property of the future owner, by instalments, paid in the course of the building. The cases are not quite clear on this subject; there is in them some reference to provisions in the English statutes as to builders' certificates, etc., which do not exist in our own; but on general principles we should say, that, where the owner is to pay for her by instalments, if the instalments are merely *on time*, without reference to the state or forwardness of the ship, the property remains in the builder until the ship is finished and delivered; and if she be lost or destroyed in the mean time, it is the builder's loss, and he is still bound to build, finish, and deliver a ship at the appointed time. But if the instalments, although on time, are graduated, expressly or impliedly, upon the condition of the ship,

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the time of Theseus until the reign of Ptolemy Philadelphus. They were at great pains to replace the old with new planks: and hence arose a great dispute among the philosophers of the time; namely, whether this vessel, of which there did not remain a single original piece, was the same which conveyed Theseus, the conqueror of the Minotaur, in returning from the isle of Crete. The same question even now is stirred on the subject of the Bucentaur, a kind of sacred galley used on Ascension day in every year, by the nobles of Venice, when the doge performs the ceremony of espousing the sea. Though all the members of a body or its parts are changed through the lapse of time, nevertheless, by force of substitution the body is still presumed the same: *Licèt spatio temporis singula corpora mutentur, tamen, mediante subrogatione, semper dicitur eadem res.* It is always the same people, the same senate, the same legion, the same edifice, the same flock, the same ship, etc.; *Idem populus, eadem navis, idem ædificium, idem grex, idem vivarium,*" etc. See also Malynes' Lex Merc. 123.

[1] Molloy, Book 2, ch. 1, § 6.

and are intended to pay the builder for work and labor and materials to the time of payment, and to purchase the fabric as it then existed, each payment is in full for a purchase of the ship at the time it is made, and has the effect of passing the property absolutely to the vendee, subject only to the lien of the builder for the purpose of finishing the ship.

It will be seen in the note below, that the cases on this subject are quite irreconcilable. We think, however, the law must be this: A may sell his lumber, out of which a ship is to be made, to B, and B may buy it whenever they please, and where ever the lumber may be. And if, from all the facts, it is plain that it was the intention of the parties that one should sell and the other buy the fabric before it was completed, there is nothing in the law to prohibit or avoid the bargain. But such a bargain is not proved by the mere fact of instalments, however graduated, nor by the employment by the payer of a superintendent, (on which fact great stress is laid in some of the cases,) although these facts may go far towards identifying the structure, and sustaining an action for a breach of the contract in not finishing or not selling that very ship; and they may have an important bearing on the amount of damages. But they may, nevertheless, be insufficient to prove an actual sale and transfer of the property.[1]

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[1] The general principle, that a sale cannot be *executory* and that there can be no sale of a thing not in existence at the time, but merely a *contract to sell*, which passes no property in the object itself until it is finished and delivered, but gives a mere personal right of action, applies to a ship as to any other chattel, although payment be made in advance. Mucklow *v.* Mangles, 1 Taunt. 318.

In Woods *v.* Russell, 5 B. & Ald. 942, the circumstances of the case were somewhat peculiar. "This ship," said *Abbott*, C. J., in delivering the opinion of the court, "is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." Although the case itself was decided on a different ground, namely, that the builder having signed his certificate to enable the purchaser to have the ship registered in his own name, the property vested in the latter from the time of the registry, the authority of this dictum was recognized in Battersby *v.* Gale, cited 4 A. & E. 458, and in Atkinson *v.* Bell, 8 B. & C. 277, 282, by *Bayley*, J., who in alluding to Woods *v.* Russell, said: "As by

The builder transfers the ship to the first purchaser by the original bill of sale, which is called in England the grand bill

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the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price, the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made." And also, though with considerable doubt and hesitation, in Clarke *v.* Spence, 4 A. & E. 448, where the court seem to have rested their acquiescence in the doctrine of *Abbott*, C. J., more upon the ground of precedent and expediency than principle. The case itself was similar to Woods *v.* Russell, with the omission of the registration, and the additional fact that an agent was employed by the purchaser to superintend the building and approve the materials employed. Whence "it follows," said *Williams*, J., "that, as soon as any materials have been approved by the superintendent, and used in the progress of the work, the fabric consisting of such materials is appropriated to the purchaser, otherwise the superintendent might be called upon, when one vessel had been nearly constructed, to begin his work *de novo*, and superintend the building of a second: and, in this point of view, the appointment of a superintendent by the contract appears to be of considerable importance."

In Moody *v.* Brown, 34 Maine, 107, there is a dictum, which admits that where payment is to be made by instalments the property will pass. In New York, however, a different rule of law is laid down, and it is there held that in such a case the property will not pass until the vessel is completed and delivered. Merritt *v.* Johnson, 7 Johns. 473. See also Johnson *v.* Hunt, 11 Wend. 135. It was so held also in a case where, in addition to the price being paid by instalments, a person was appointed by the vendee to superintend the work, though the court admitted that in such a case the builder would be bound to deliver the identical vessel. Andrews *v.* Durant, 1 Kern. 35. In Scotland, the law as it is in England was settled by a very early case. Smith *v.* Duncanson's creditors, decided in 1786, Bell on Sales (1844) p. 17. But where payment is to be made in a specific manner, without reference to the progress of the work, the property will not pass. Laidler *v.* Burlinson, 2 M. & W. 602. In the late case of Wood *v.* Bell, 5 Ellis & B. 772, 34 Eng. L. & Eq. 178, the vessel was to be paid for by instalments, the first four on certain days named and unconditionally; with no express reference to the stage in her building to which she might be advanced on the arrival of those days, and it was not apparent that the sums specified for each payment were to be commensurate with her probable progress on the days named. The next three instalments were also made payable on days certain; but the first two of these payments were made to depend on her having been carried on to certain specific stages in her building on those days respectively. The payment of the third depended on her being, on the day named, built according to contract. The next circumstance was, that the vessel was to be built under the direction of a person appointed by the future purchaser. It also appeared in evidence that the builder, at the instance of the plaintiff, punched his name on the keel, for the express purpose of securing the vessel to the plaintiff, and, although he refused after this to execute a formal assignment to the plaintiff, yet at the same time he admitted her to be the plaintiff's property. It was held that whether the property passed was to be shown by the intention of the parties, as gathered from all the circumstances of the case. In regard to the payment by instalments, no decided opinion was expressed. As to the appointment of a person to superintend the work, the following language is used: "It certainly could not be contemplated that he was to superintend the building of more than one vessel under this

of sale, to distinguish it from the bills of sale made on subsequent transfers of the ship. But, as we have already remarked,

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contract, or that he was to superintend the building of any vessel which Joyce could, at his pleasure, transfer to another person. Still, it must be admitted, that this is by no means conclusive as to the question of property; it may be that it would have been a breach of contract not to deliver the specific vessel to the plaintiff as soon as she was completed, and yet the property, until she was completed, might have remained in Joyce." But it was held, that, however ambiguous these circumstances might be, still the punching of the name, and the declaration of the builder, were conclusive to show that it was the intention of the parties that the vessel should pass to the plaintiff. Affirmed in the Exchequer Chamber, 25 L. J., B. Q., 321, 36 Eng. L. & Eq. 148. In Baker *v.* Gray, 17 C. B. 462, 34 Eng. L. & Eq. 387, payments were to be made by instalments from time to time, and it was stipulated that if the vessel was not finished within a certain time the vendee might enter and take possession of her, and that the property in her should be deemed, from the payment of the first instalment, to be in the vendee. It may, therefore, be considered as doubtful whether the mere fact of payment being made by instalments, although commensurate with the progress of the vessel, is of itself proof that the parties intended the property to pass, and a contract similar to the one in Baker *v.* Gray has at least simplicity and safety to recommend it. It was decided in Glover *v.* Austin, 6 Pick. 209, that, although a contract to build a ship was inoperative to pass the property therein, yet a conveyance of the keel, after it had been laid, vested the property of that in the vendee, and drew after it all subsequent additions, according to the maxim of the Civil Law, "*proprietas navis carinæ causam sequitur.*" See also Sumner *v.* Hamlet, 12 Pick. 76, 82.

An *agreement to pledge* a vessel then building to cover certain advances, and that the pledgee may purchase her at a certain rate, is neither a sale nor a mortgage or pledge, and transfers no property in the vessel, although the advances are made. Bousey *v.* Amee, 8 Pick. 236. But in Reid *v.* Fairbanks, 13 C. B. 692, 24 Eng. L. & Eq. 220, where, under an agreement to build a ship, the defendant, to secure the plaintiffs, as well for the advances they had previously made to him as for those which they should be called upon to make to complete the vessel, made them a bill of sale thereof, which stated that he transferred to them a certain ship in progress of building, (describing it,) and also six hundred tons of timber to finish the vessel, "to have and to hold the said ship or vessel, etc., to the said J. Read, when the said ship or vessel shall be completed and finished, in as full, ample, and perfect a manner as if the said ship or vessel was ready for sea, and ready to be delivered to the said J. Read at the time of executing these presents," it was held by the court that the property passed to the plaintiffs by the bill of sale, and that the *habendum* had not the effect of postponing the vesting thereof to the time when the ship should be completed. *Jervis*, C. J. said: "There is no doubt the whole question is one of construction of contract. There may be cases in which such a contract would have the effect of transferring the property only at a future period, or it may have the effect of transferring the property at once; but it seems to me that here it was intended to pass the property at once, because the object of the instrument was to give the plaintiffs security for advances. It has been contended that it is no security, but merely a contract between the parties; but it professes to be a security, and it cannot be so unless it operate as a present sale, and it does not signify what happens afterwards. It is, therefore, unimportant to consider the effect of the registration of the vessel. I think it very likely that if there had been no bill of

this distinction does not exist, or not for any practical purpose, in this country.[1]

The builder should deliver to the first owner his certificate, that the owner may give it to the collector, as required by the statute of registration.[2]

4. *Of the Possession of the Purchaser.*

The ship, although only a personal chattel, is one of a peculiar character; and these peculiarities introduce some modifications in the principles of the law of sale, or in the application of them; particularly in the rule as to delivery and possession. This rule, in reference to chattels generally, is, that if possession do not pass at once, or with but little delay, it is a badge of fraud, and the sale is defeated. But a ship may be sent to sea, not merely to go to the antipodes, but to pass from port to port as profitable engagements shall offer, for many years. It is certain, however, that the owner should, in the mean time, be able to sell his ship, if he wishes to. And the rule which we would lay down is this: that a *bonâ fide* sale, on consideration, with whatever transfer of papers and of registry can be made, is valid, if possession be taken by the purchaser as soon as is practicable by reasonable endeavor, however long it may be before such possession is or can be taken.

The principles, we should say, are these: first, that the sale, meaning a transfer on good consideration and in good faith, does not give merely an inchoate right, to be completed by possession; but does in fact pass the whole property in the ship, and is a complete transfer thereof, vesting the same in the pur-

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sale there would still have been enough to bind the property in the ship. But it is unnecessary to consider that part of the case." The effect of these decisions seems to be that the time when the property in a ship passes, on a contract for building her, is a question of intent to be gathered from all the circumstances of the case. Where the property does pass before the completion of the ship, the builder has a common law lien, or right of possession to finish her and earn the full price. Woods *v.* Russell, *supra*.

[1] See ante, p. 57, note 2.

[2] Act of 1792, ch. 1, § 8, 1 U. S. Stats. at Large, 291. As to the effect of the transfer of the builder's certificate to the purchaser under the English Registry Acts, see Woods *v.* Russell, 5 B. & Ald. 942.

chaser, but liable to be divested by his laches in taking possession. The second would be this: that the purchaser is not bound to take possession as soon as possible by any means; he is not bound to go, or send an agent, or even transmit authority at once to a foreign and a distant port; but may, generally at least, wait her arrival in her home port. He ought, however, in prudence, if not in law, to forward notice of the sale and transfer to him to the master of the ship, (which has been held equivalent to taking possession,) and also to cause his name to appear on the register of the United States as owner, as soon as practicable, that he may give the public whatever notice such a record gives.

The distinction we make in the first principle is of much practical importance. If such a sale gives only an inchoate right, to be completed by possession, then of two innocent transferrees which ever can, by any means, get possession first, prevails over the other. This we deny to be the law, and hold that the cases which seem to lead to this conclusion are either erroneous, or are to be justified only by their peculiar circumstances. Undoubtedly, priority of possession may lead to an inference of laches in him who does not get possession; but it by no means proves it; and that is the only question. This will always be a question of mixed law and fact, and may sometimes be a difficult one. We say, however, that a subsequent purchaser cannot defeat the title of an earlier purchaser, by using means to get possession which the first purchaser either could not use or was not bound to use, and the non-user of which was not laches. Even that court which has permitted a second purchaser to complete his title by a first possession, and defeat a former purchaser without laches, has held that an attaching creditor has not a similar right. For if there be a sale in good faith, then an attachment by a creditor of the seller, and after that, but without any laches, possession is taken by the purchaser, the attachment is defeated.[1]

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[1] Both in England and in this country, such a transfer, whether absolute or by way of mortgage, or in trust, is valid, provided the vendee or mortgagee take possession of the ship within a reasonable time after her arrival in port. Such actual possession being requisite, not to vest the property in him, — for this is completed by the livery of the bill of sale, or other muniments of title, Lord *v.* Ferguson, 9 N. H. 380; Brooks *v.* Bondsey, 17 Pick. 441, — but to exclude the operation of the statutes of James I.

The effect of an entry of a transfer in the custom-house record, or of a registration of the purchaser, as owner, or of the want of

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and Elizabeth, where they are recognized, and generally because a failure to take possession is evidence of fraud. *Ex parte* Matthews, 2 Ves. Sen. 272; Atkinson *v.* Maling, 2 T. R. 462; Gordon *v.* East India Co. 7 T. R. 228, 234; Robinson *v.* Macdonnell, 5 M. & S. 228; Philpot *v.* Williams, 2 Eden, Ch. 231; *Ex parte* Batson, 3 Bro. Ch. 362; Kirkley *v.* Hodgson, 1 B. & C. 588; Mair *v.* Glennie, 4 M. & S. 240; Hay *v.* Fairbairn, 2 B. & Ald. 193; Portland Bank *v.* Stubbs, 6 Mass. 422; Portland Bank *v.* Stacey, 4 Mass. 661; Putnam *v.* Dutch, 8 Mass. 287. In Lamb *v.* Durant, 12 Mass. 54, 56, *Parker*, C. J., held it to be well settled that such a conveyance by *deed* passes the property. But the distinction, if any was meant, is not recognized in the other cases. See Tucker *v.* Buffington, 15 Mass. 477; Badlam *v.* Tucker, 1 Pick. 389; Gardner *v.* Howland, 2 Pick. 599; Joy *v.* Sears, 9 Pick. 4; Pratt *v.* Parkman, 24 Pick. 42; Turner *v.* Coolidge, 2 Met. 350; Winsor *v.* McLellan, 2 Story, 492; Brinley *v.* Spring, 7 Greenl. 241; Morgan's Ex'rs *v.* Biddle, 1 Yeates, 3; Wheeler *v.* Sumner, 4 Mason, 183; D'Wolf *v.* Harris, 4 Mason, 515; Conard *v.* Atlantic Ins. Co. 1 Pet. 386, 449. But the purchaser takes possession subject to all valid claims before notice of transfer. See cases *supra*, also Gillespy *v.* Coutts, Ambler, 652. It is true that in Portland Bank *v.* Stubb, 6 Mass. 422, 425, *Parsons*, C. J., says: "The conveyance by Weeks & Son to the plaintiffs being a mortgage, it is a pledge of a personal chattel. But to such pledge a delivery of the chattel is essential to give the pawnee a special property in it. And although a ship at sea may be mortgaged, yet the mortgagee must take possession as soon as he may on her return, before the mortgage is complete." But by this is meant only that it is not complete in regard to a third person without notice. The cases also of Lamb *v.* Durant, 12 Mass. 54, and Lanfear *v.* Sumner, 17 Mass. 110, have been supposed to support the doctrine that as between two innocent purchasers he who first acquires *actual* possession completes his title as against the other; and the latter case has been questioned on that ground. Ingraham *v.* Wheeler, 6 Conn. 277, 284; Ricker *v.* Cross, 5 N. H. 570, 573. See, also, 6 Law Reporter, 95. This is owing, we think, to a misunderstanding of the principles on which those cases were decided. It is well settled, that, as between the parties, the property in goods sold will pass to the vendee, although the possession may remain in the vendor. But under the statute of 13 Elizabeth, to render the transfer valid as to third parties without notice, there must be a change of possession. 1 Parsons on Contracts, 441, 442; Twyne's case, 1 Smith's Lead. Cas. 1. But, where actual delivery is impossible, constructive, or, as it is sometimes called, symbolical delivery, is sufficient. The difficulty has arisen from overlooking this fact. In both Ingraham *v.* Wheeler and Ricker *v.* Cross there was a delivery of this nature. But in Lamb *v.* Durant and Lanfear *v.* Sumner this was not the case. In the latter, the goods were supposed by their owners in Philadelphia to be at sea. They were actually landed in Boston. A written assignment was made in Philadelphia and delivered, but no money was paid, no bill of lading transferred, and there was no pretence whatever of any symbolical delivery. The goods were subsequently attached by creditors of the vendors, and possession taken by the sheriff, against whom the action was brought. The court did not deny, that, if there had been a legal, as distinguished from an actual delivery to the first purchaser, his title would have been protected. See also Gardner *v.* Howland, 2 Pick. 599, 602, per *Parker*, C. J. In Lamb *v.* Durant, the vessel was owned by a firm. One partner was abroad, and in actual possession of the vessel. It was held, that, under the cir-

such registration, presents questions connected somewhat with that which we have just considered. The question is, in fact, whether this custom-house record is intended to be, or is in law, a public record, having a similar effect upon title that the public registry of deeds has on land titles. That is, is an entry of transfer or title in that registry, public notice to all the world; and can a subsequent transferree hold wherever there is no such register, unless, — agreeably with the equitable construction of the statutes of land registry, — a knowledge of the transfer can be brought home to him, which shall have, so far as he is concerned, the same effect as a public registry? This subject has already been fully considered, and we refer to what we have said upon it in a former section and notes.[1]

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cumstances of the case, a transfer by the home partner must be subject to all incumbrances, made by the partner in possession before notice of transfer, and that accordingly a sale with delivery of possession by the latter would intercept the title attempted to be passed by a sale by the former. In such a case it might well be held that there could be no constructive delivery by the home partner. See Hewitt *v.* Sturdevant, 4 B. Mon. 453. The purchaser must, however, take possession within a reasonable time after the vessel arrives in port, and what is such a reasonable time is a question for the jury to determine from all the circumstances of the case. Joy *v.* Sears, 9 Pick. 4. Possession must be taken before the departure of the vessel on a new voyage, where the transferree is aware of her arrival in port. *Ex parte* Matthews, 2 Ves. Sen. 272. In Brinley *v.* Spring, 7 Greenl. 241, the court say that it may be deduced from the case of Mair *v.* Glennie, that notice to the captain supersedes the necessity of taking possession of the ship. So in Turner *v.* Coolidge, *supra*, the court strongly inclined to the opinion, that the possession of one part-owner who acted for himself and also for the other part-owner, who had purchased the rest of the vessel, superseded the necessity of the vendee's taking formal possession, and vested the property in him. See, also, Addis *v.* Baker, 1 Anstr. 222; Winsor *v.* McLellan, 2 Story, 492. Where the assignment is conditional, as in the case of a mortgage, an agreement that the mortgagor shall remain in possession until condition broken likewise relieves the mortgagee from the obligation to take possession. Badlam *v.* Tucker, 1 Pick. 389; Conard *v.* Atlantic Ins. Co. 1 Pet. 386, 449. As to the consequences of allowing the assignor to remain in possession, where there is no such agreement in the bill of sale, and the ship is not at sea, under 21 Jac. c. 19, § 11, see Monkhouse *v.* Hay, 2 Brod. & B. 114; Robinson *v.* McDonnell, 2 B. & Ald. 134; Stephens *v.* Sole, cited in Ryall *v.* Rowles, 1 Ves. Sen. 352; Hall *v.* Gurney, 24 Geo. 3, B. R., 1 Cooke's Bankrupt Laws, 342. It would seem in accordance with the general principle governing such transfers, that it is not essential to their validity that the ship should be *at sea* at the time, provided she is equally beyond the immediate control of her owner, and accordingly in *Ex parte* Batson, 3 Bro. Ch. 362, and in Putnam *v.* Dutch, 8 Mass. 287, the court held a sale of a vessel in another port to be effective, provided the vendee was guilty of no laches in taking possession on her arrival in the port where he resided.

[1] See p. 40, note 2, and sect. 1, of this chapter.

CHAPTER IV.

OF PART-OWNERS.

SECTION I.

HOW PARTNERSHIP IN VESSELS IS CREATED.

Two or more persons may own a ship by building it together, or purchasing it together, or by even purchasing a part. However it be acquired, they are tenants in common and not joint-tenants, unless by force of a special agreement between them. Therefore if one dies, his share goes to his representatives, and not to the surviving part-owners.[1] If the register or instrument of transfer, or written evidence of ownership, do not define the proportions in which they hold the property, they will, in the absence of proof to the contrary, be presumed to have equal shares.[2]

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[1] In a note in Abbott on Shipping, p. 97, first introduced by the author in the third edition, it is supposed, that, if a ship were granted to a number of persons generally, without distinguishing in any way the shares of each, they would become joint-tenants at law, and that the rule *jus accrescendi inter mercatores locum non habet* could be enforced only in equity. For this doctrine no authority is cited, and we are confident that it is not the law. That part-owners are tenants in common has been settled in numerous cases. Graves *v.* Saweer, T. Raym. 15; *Ex parte* Young, 2 Ves. & B. 242; s. c. 2 Rose, 78, n.; *Ex parte* Harrison, 2 Rose, 76; Owston *v.* Ogle, 13 East, 538; Helme *v.* Smith, 7 Bing. 709; The King *v.* Collector of the Customs, 2 M. & S. 223; Green *v.* Briggs, 6 Hare, 395; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Mumford *v.* Nicoll, 20 Johns. 611; Lamb *v.* Durant, 12 Mass. 54; Merrill *v.* Bartlett, 6 Pick. 46; Thorndike *v.* DeWolf, 6 Pick. 120; French *v.* Price, 24 Pick. 13; Harding *v.* Foxcroft, 6 Greenl. 76; Patterson *v.* Chalmers, 7 B. Mon. 595, 598; Milburn *v.* Guyther, 8 Gill, 92; Jackson *v.* Robinson, 3 Mason, 138; Macy *v.* DeWolf, 3 Woodb. & M. 193, 205; Knox *v.* Campbell, 1 Penn. State, 366; Hopkins *v.* Forsyth, 14 Penn. State, 34, 38; Buddington *v.* Stewart, 14 Conn. 404; Revens *v.* Lewis, 2 Paine, C. C. 202.

[2] Glover *v.* Austin, 6 Pick. 209, 221, per *Parker*, C. J.; Ohl *v.* Eagle Ins. Co. 4 Mason, 172; Alexander *v.* Dowie, 1 H. & N. 152, 37 Eng. L. & Eq. 549, 551, per *Pollock*, C. B. But the Act of 1850, c. 27, § 5, 9 U. S. Stats. at Large, 441, provides that "the part or proportion of the vessel belonging to each owner, shall be inserted in the register of enrolment."

A ship, like any other chattel, may be held in partnership, and constitute a part of the stock in the firm.[1] And then all the powers, duties, and obligations of the owners towards each other will be determined by the law of partnership. And if persons who own a ship as part-owners, and not as partners, equip and fit the ship out in all respects, and load her and send her forth upon adventure, in the cost and profit and control of which they are to share as partners would, there seems no reason for denying that they hereby form a partnership, or, at least, a *quasi* partnership for this voyage and adventure;[2] and that the law of partnership will apply to it so far as to give each of them a lien on the property for his disbursements and advances, for and upon this ship and voyage, and render them liable in the same way as partners;[3] although it might be doubted, perhaps, whether, if the partnership be such a constructive one, it would give to each part-owner the absolute power of disposing of the whole property, in the same way in which a partner would have that power.[4]

There is certainly no right of survivorship among part-owners of a ship; and it is said *jus accrescendi, inter mercatores, pro beneficio commercii locum non habet.*[5]

It has been held, (but is not now,) that all the part-owners of a ship must be parties to a bill filed for an account of the profits of a ship,[6] however arising, or in whatever form existing;

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[1] Doddington *v.* Hallet, 1 Ves. Sen. 497; Wright *v.* Hunter, 1 East, 20; Mumford *v.* Nicoll, 20 Johns. 611; Harding *v.* Foxcroft, 6 Greenl. 76; Phillips *v.* Purington, 15 Maine, 425; Seabrook *v.* Rose, 2 Hill, Ch. 553; Patterson *v.* Chalmers, 7 B. Mon. 595; Hewitt *v.* Sturdevant, 4 B. Mon. 453.

[2] Doddington *v.* Hallet, 1 Ves. Sen. 497; Mumford *v.* Nicoll, 20 Johns. 611, reversing the decision of Chancellor *Kent* in the same case, 4 Johns. Ch. 522. See, also, Macy *v.* DeWolf, 3 Woodb. & M. 193; Hewitt *v.* Sturdevant, 4 B. Mon. 453; Hinton *v.* Law, 10 Mo. 701; Gardner *v.* Cleveland, 9 Pick. 334. See, however, Hopkins *v.* Forsyth, 14 Penn. State, 34, 38.

[3] Doddington *v.* Hallet, 1 Ves. Sen. 497; Holderness *v.* Shackels, 8 B. & C. 612, 3 Man. & R. 25; Mumford *v.* Nicoll, 20 Johns. 611, 625; Hewitt *v.* Sturdevant, 4 B. Mon. 453, 466.

[4] Hewitt *v.* Sturdevant, 4 B. Mon. 453, 466. In this case it was held, that, where a steamboat was built to carry freight and passengers, and not to be sold, although held in partnership by her owners, one could not sell without the consent of the others.

[5] See *ante*, p. 82, note 1, and Bulkley *v.* Barber, 6 Exch. 164, 1 Eng. L. & Eq. 506.

[6] Moffatt *v.* Farquharson, 2 Brown, Ch. 338. This, however, is not now the law; but a bill may be brought by one part-owner on behalf of himself and the others.

because the claims for freight or cargo follow the general law of partnership.[1]

A copartner may transfer his interest in the copartnership effects to any one; but he cannot introduce any other person into the firm as a partner, either by transfer to him, or in any other way, without the consent of the other partners.[2] But a part-owner may transfer his share of a ship to any person, and the transferree acquires at once all the rights and powers, as well as all the interest which the transferrer possessed.[3] But no part-owner can sell any thing more than his own share in the ship, unless authorized by some other part-owner to sell as his agent.

As part-ownership is the usual form of ownership of a ship, and partnership is the exception, the former will be presumed until the latter is proved.[4]

SECTION II.

OF THE POWERS OF A PART-OWNER.

The general rules of cotenancy of a chattel apply to this case. Thus, if a part-owner sells the whole ship, or the share of another part-owner, they whose shares he sells may, if they please, confirm and ratify the sale; and then it takes effect as their sale;[5] but without such confirmation it is wholly void. And it seems to be now held, that an unauthorized sale by a part-owner of the whole vessel, if carried into effect, is a constructive destruction of the property of the other owners, and trover may be maintained by them against the seller, or against the purchaser, if he also sells the property as his own.[6] But

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Lloyd *v.* Loaring, 6 Ves. 773, 779; Adair *v.* New River Co. 11 Ves. 429; Good *v.* Blewitt, 13 Ves. 397; Cockburn *v.* Thompson, 16 Ves. 321; Pearce *v.* Piper, 17 Ves. 11, 15, 16.

[1] Green *v.* Briggs, 6 Hare, 395.

[2] Collyer on Partnership, 4; Story on Partnership, § 5; *Ex parte* Barrow, 2 Rose, 252, 255; Crawshay *v.* Maule, 1 Swanst. 495, and note (a), p. 509.

[3] See Oviatt *v.* Sage, 7 Conn. 95.

[4] Patterson *v.* Chalmers, 7 B. Mon. 595.

[5] Oviatt *v.* Sage, 7 Conn. 95; Putnam *v.* Wise, 1 Hill, 234.

[6] Weld *v.* Oliver, 21 Pick. 559; White *v.* Osborn, 21 Wend. 72; Hyde *v.* Stone,

trover does not lie against a part-owner of a ship, or, indeed, any tenant in common, for merely dispossessing his co-owner;[1] nor can one part-owner maintain replevin against another;[2] nor, perhaps, bring trespass for the sale of the whole.[3] Neither can a part-owner recover damages against another at law, for fraud-

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9 Cow. 230; s. c. 7 Wend. 354; Wilson *v.* Reed, 3 Johns. 175; Thompson *v.* Cook, 2 Southard, 580; Farr *v.* Smith, 9 Wend. 338. See, also, on this point, Barton *v.* Williams, 5 B. & Ald. 395; Farrar *v.* Beswick, 1 M. & W. 682, per *Parke*, B.; Mayhew *v.* Herrick, 7 C. B. 229.

[1] Fennings *v.* Ld. Grenville, 1 Taunt. 241; Selden *v.* Hickock, 2 Caines, 166; Mersereau *v.* Norton, 15 Johns. 179; Hyde *v.* Stone, 9 Cow. 230; Hurd *v.* Darling, 14 Vt. 214. There appears to be some controversy as to what will authorize one tenant in common to commence an action against a co-tenant. In the old case of Graves *v.* Sawcer, T. Raym. 15, the court held that *case* would not lie at the suit of one part-owner against another for fraudulently carrying the ship to foreign parts, and there converting her to his own use, for "there cannot be any fraud between tenants in common, because the law supposes a trust and confidence between them." See the same case, reported 1 Lev. 29, 1 Keble, 38. But in the subsequent case of Barnardiston *v.* Chapman, cited 4 East, 121, the plaintiff was tenant in common of one moiety of a ship, and the defendants cotenants of the other moiety. The defendants took the vessel by force from the possession of the plaintiff, and sent it to Antigua, where it was lost. It was contended that trover would only lie in case of an actual destruction, to which *King*, C. J., agreed, but left it to the jury whether, if it was found that the ship was taken away by force and secreted and carried beyond the reach of the plaintiff, an ensuing loss would not amount to a destruction.

The jury found that it would, and the Court unanimously agreed to the directions of the chief justice, and refused to grant a new trial. And in Lowthorp *v.* Smith, 1 Hayw. (N. C.) 255, the court state the law as follows: "If one of two joint-owners takes possession of the whole, no action will lie for this, for one hath as much right to the possession as the other; but if, after taking possession, he destroys the property, he is then liable, because the joint ownership does not empower him to destroy the property of the other; and if such joint-owner, after getting the sole possession, shall, without the consent, or against the will of the other owner, send the vessel to sea, and she be lost in that voyage, the jury may consider such loss as a destruction of the vessel, occasioned by the joint-owner by means of sending her to sea, and find for the plaintiff." And so, generally, if a tenant in common, though rightfully in possession, yet by negligence causes the destruction of the property, an action will lie against him. Chesley *v.* Thompson, 3 N. H. 9; Herrin *v.* Eaton, 13 Maine, 193; Maddox *v.* Goddard, 15 Maine, 218; Anders *v.* Meredith, 4 Dev. & Bat. 199. But in Moody *v.* Buck, 1 Sandf. 304, where one of two joint-owners of a vessel took upon himself the management, direction, and control of the whole vessel, and by his carelessness, inattention, and negligent and improper conduct the vessel took fire and was consumed, it was held that he was not liable to the other part-owner. See also, as to actions between part-owners of a ship, generally, Milburn *v.* Guyther, 8 Gill, 92; Guillot *v.* Dossat, 4 Mart. La. 203.

[2] Barnes *v.* Bartlett, 15 Pick. 71.

[3] Furlong *v.* Bartlett, 21 Pick. 401.

ulently and deceitfully sending the ship on a foreign voyage, whereby she was lost;[1] nor in equity for the loss of a ship sent to sea against his consent.[2]

It is said, that, at common law, the majority of the part-owners may control and employ the ship at their pleasure, and put on board or remove whatever officers or masters they choose.[3] We doubt, however, whether this majority could dispossess a master who was himself a part-owner,[4] although such master, if dispossessed, could have at law only his claim for damages, and if he were removed for good cause, they would of course be only nominal.[5] Questions of this sort do not often, in this country, come before our courts, either of common law or of equity; as our admiralty courts claim and exercise a complete jurisdiction over this whole subject-matter; and we shall consider this at some length in our chapter upon admiralty.

It is said that a part-owner of a ship, if the other part-owners are absent, and have not prohibited his action, has an implied authority to represent them in the management of the vessel, and that they will therefore be bound by his acts and contracts.

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[1] See *ante*, p. 85, note 1.

[2] Anonymous, Skinner, 230; Strelly *v.* Winson, 1 Vern. 297. It is said in Horn *v.* Gilpin, Amb. 255, that the reason for the decision in Strelly *v.* Winson is not stated correctly in the reports, the real ground of the decision being that the part-owner did not expressly dissent.

[3] Card *v.* Hope, 2 B. & C. 661; Gould *v.* Stanton, 16 Conn. 12.

[4] In The New Draper, 4 Rob. Adm. 287, 290, an action was instituted by the majority of the part-owners against a part-owner who was the master, to dispossess him of the command. Sir *William Scott* said: "The dispossession of a master is in its nature not an uncommon proceeding; all that the court requires, in cases where the master is not an owner, is, that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master *and part-owner*, something more is required before the court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is upon general principles inclined to maintain. It is not, however, by any means unprecedented for this court to proceed even to that extent; but then some special reason is commonly stated to induce the court to interpose." See also, Boulay Paty, Droit. Comm. Tom. 1, tit. 3, § 5. In the case of a foreign ship, as a general thing, the court will not interfere, on application of the other part-owners, to dispossess a captain who is also an owner. The Johan and Siegmund, Edw. Adm. 242. The court, however, in a subsequent case exercised the power where a decree of the tribunal of the country to which the vessel belonged, exercising admiralty jurisdiction, was produced, directing the master to deliver up the vessel. The See Reuter, 1 Dods. 22.

[5] Montgomery *v.* Wharton, 2 Pet. Adm. 397, Bee, 388, 1 Dall. 49.

Something of this is perhaps true of all cotenants of chattels; and it may possibly be carried further in the case of ships, from the nature of the property; but there must be a limit to this rule, for certainly absent part-owners would not be bound by any act of a part-owner, which was in itself or by force of circumstances so utterly and obviously unreasonable or prejudicial, that no one could rationally believe that they had authorized the act. Indeed, a consideration of the cases, and especially the latest, would lead to some doubt, whether a part-owner of a ship, as such, that is, when not authorized by being master or ship's husband or otherwise, has any more power to bind his copart-owners, than the cotenant of any other chattel has.[1]

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[1] It is said in Abbott on Shipping, 105, "With regard to the repairs of a ship and other necessaries for the employment of it, one part-owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, *unless their liability be expressly provided against.*" In support of this proposition several cases are cited, but it will be found on examination that they are either cases of partnership, or those in which the repairs were ordered by a person who was also the ship's husband or the master. The question, whether one part-owner is liable for repairs ordered by another who is not the ship's husband, has seldom arisen, though there are numerous dicta on the subject. In *Ex parte* Bland, 2 Rose, 91, 93, and in Stewart *v.* Hall, 2 Dow, 29, the repairs were ordered by the master. In Beckham *v.* Knight, 5 Scott, 619, and in Patterson *v.* Chalmers, 7 B. Mon. 595, the parties were partners, and not part-owners merely. In the following cases the repairs were ordered by the ship's husband, and the other part-owners were held liable. Chapman *v.* Durant, 10 Mass. 47; Schemerhorn *v.* Loines, 7 Johns. 311; Muldon *v.* Whitlock, 1 Cow. 290; Thompson *v.* Finden, 4 Car. & P. 158. In Carlisle *v.* The Steamer Eudora, 5 La. Ann. 15, the action was brought by a pilot against the steamer and owners. The plaintiff was employed by one owner, who represented the vessel, by a written contract. There was parol evidence that at the time of entering into the contract the plaintiff contemplated the liability of all. Both owners were held liable. See also Hardy *v.* Sproule, 29 Maine, 258.

This question has been recently the subject of much discussion in England, in the case of Brodie *v.* Howard, 17 C. B. 109, 33 Eng. L. & Eq. 146. The action was brought for work done, and for goods bargained and sold. The vessel was owned by two part-owners, one of whom appears to have been in possession, though not the ship's husband, and the repairs were ordered by him. The action was brought against the other owner, who, prior to the repairs being made, told his co-owner that he would not repair, and on finding that the repairs were actually in progress, he gave the plaintiff express notice that he would not be liable. It was held, that the plaintiff could not recover. It might seem that the fact of notice having been given to the plaintiff might be an element in the case which influenced the decision, but it is evident that if the copart-owner had authority to order the repairs, a subsequent countermand could not affect the vested rights of the parties, and indeed this point is not noticed by the court, who put their opinion on the broad ground that one part-owner has no authority to bind his co-owners. Mr. Justice *Williams* states the law as follows: "Part-owners of a ship

It has been held, that, if a part-owner expressly dissents from the employment of a ship on a certain voyage, and the ship is lost, he is not liable, in equity, for his share of the loss; but if he objects, and nevertheless does not expressly dissent, he is so liable.[1] If a part-owner arrests a ship and prevents a voyage, after the other owners have expended money to repair and fit her out, he has been held bound to pay his proportion of these expenses. But the repairs in this case were of a permanent nature, and such as would be beneficial to the ship after the voyage was ended.[2]

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are not in the situation of partners. To this extent they resemble partners, that they are all liable for repairs and such other necessary expenses for the ship which may be presumed to have been incurred with their assent; but they differ from partners in this respect, that the authority of one part-owner to pledge the credit of the others does not exist, as in the case of partners, unless such authority has been determined only by express dissent, communicated to third parties. There is no authority that any such law is applicable to part-owners." And *Jervis*, C. J., in the same case says: "The only matter of difficulty which I have felt is the authority of Lord Tenterden," (cited in the beginning of this note,) "from which it would seem that something must be expressly done by a part-owner to limit his liability. I think, however, that means this, — that, when a ship goes into dock to be repaired, where the part-owner has previously allowed his credit to be pledged, or has held himself out as liable, he must give express notice in order to determine the authority; but where there has been no such credit, or holding out as liable, no such notice is necessary. The explanation of it is this, that the authority once given continues, unless notice of the contrary has been given." So in Revens *v.* Lewis, 2 Paine, C. C. 202, the court say: "Where one of the part-owners is the master or ship's husband, in the absence of all special agreement on the subject he is *presumed* to have authority to do every thing necessary to be done for the employment of the vessel, and has of course authority to make repairs, and bind the vessel for the same; but as this is only an *implied or presumed authority*, it must, like all other implied powers, cease when it is revoked, or any thing is done to rebut the presumption." But in King *v.* Lowry, 20 Barb. 532, where one part-owner assumed the control of the vessel to the exclusion and against the will of the others, it was held that all were liable for the supplies ordered by this one in the home port, the party making the repairs not having knowledge of the differences which existed between the part-owners.

[1] See *supra*, p. 86, note 2.

[2] Davis *v.* Johnston, 4 Sim. 539.

SECTION III.

OF THE LIABILITY OF PART-OWNERS FOR REPAIRS OR SUPPLIES.

In general, all the part-owners are liable *in solido* for the repairs of a ship, or for necessaries actually supplied.[1] This rests in part upon the general principle, that one receiving and holding a benefit must pay for it; and in part upon the peculiar nature of this property, and the necessity there is for the public good, as well as for the advantage of each owner, that, wherever the ship may be, all who are interested in her should be regarded as authorizing such expenditure for repairs or supplies as she may require.[2] We shall see hereafter, that persons making repairs or furnishing supplies have also a lien on the ship. But they can neither have a lien on the ship, nor a personal claim against those of the part-owners who do not order them, if the repairs or supplies are wholly and obviously unnecessary, and therefore unreasonable.[3] But the necessity in this case may not be a strict one. If the things furnished are in any reasonable conformity with the character of the ship, or the nature and purposes of the voyage, or if, in fact, they are such that any rational part-owner may be supposed to have desired them, it will be difficult for the absent part-owners to escape their liability.[4]

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[1] Westerdell *v.* Dale, 7 T. R. 306; Chapman *v.* Durant, 10 Mass. 47; Schemerhorn *v.* Loines, 7 Johns. 311; Muldon *v.* Whitlock, 1 Cow. 290; Hardy *v.* Sproule, 29 Maine, 258; Wright *v.* Hunter, 1 East, 20; Baldney *v.* Ritchie, 1 Stark. 338; Thompson *v.* Finden, 4 Car. & P. 158; Macy *v.* De Wolf, 3 Woodb. & M. 193, 204; Gallatin *v.* The Pilot, 2 Wallace, C. C. 592. In Louisiana, it is held that part-owners are not liable *in solido*, except when they form a partnership. Carroll *v.* Waters, 9 Mart. La. 500; Kimbal *v.* Blanc, 20 Mart. (La.) 386; David *v.* Eloi, 4 La. 106, 108; Burke *v.* Clarke, 11 La. 206.

[2] See remarks of *Parker*, J., in James *v.* Bixby, 11 Mass. 34, 36.

[3] Molloy, B. 2, ch. 1, § 10; The Vibilia, 1 Wm. Rob. 1, 10; The Sophie, 1 Wm. Rob. 368; Mackintosh *v.* Mitcheson, 4 Exch. 175; The Ship Fortitude, 3 Sumn. 228, 233; United Ins. Co. *v.* Scott, 1 Johns. 106, 111; Pratt *v.* Tunno, 2 Brev. 449; Wainwright *v.* Crawford, 3 Yeates, 131, s. c. 4 Dall. 225; Merwin *v.* Shailer, 16 Conn. 489; Philips *v.* Ledley, 1 Wash. C. C. 226; Beldon *v.* Campbell, 6 Exch. 886, 6 Eng. L. & Eq. 473; Leddo *v.* Hughes, 15 Ill. 41.

[4] Webster *v.* Seekamp, 4 B. & Ald. 352, and cases *supra*.

It has been said, that a part-owner of a vessel is not liable to another for repairs made at a home port without his consent. If made against his prohibition, he would not be liable; but we should suppose his consent would generally be inferred, if the repairs were reasonable and proper, and he made no objection. A considerable distinction exists in respect to all the powers of a part-owner, a master, or a ship's husband, between the exercise of them abroad and in a home port. The reason is obvious. A ship far from its home might perish for want of aid which was delayed until all the owners could be consulted. But if at home, all who will have to pay have an unquestionable right to be consulted. It is not, however, quite certain whether the fact that the vessel is in a home port, which certainly limits these powers, goes so far as to destroy them. In other words, the question, whether one part-owner can bind another in a home port without specific authority, may be regarded as still open.[1]

If one who has a claim for repairs or supplies receives a part of his claim from one or more of those liable *in solido*, those who thus pay a part, even if it be their share, or more than their share, are still liable for the residue. And they are thus liable, although the supplier expressly promised to discharge them in consideration of their paying as they did; for their payment alone would not be consideration enough in law to sustain the promise, even if they paid more than their shares, because they were legally bound to pay the whole.[2] But if they paid on request, before they were bound to pay, or otherwise in any manner beneficial to the promisor, and not obligatory on them, or if they received a discharge under seal, the part-owners paying would be no further liable.[3] It may, however, be doubted whether, in admiralty, the presence of a seal upon the discharge would make much if any difference. This we shall consider in our chapter on Admiralty practice.

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[1] Benson *v.* Thompson, 27 Maine, 470; Hardy *v.* Sproule, 31 Maine, 71. In Mitcheson *v.* Oliver, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, 236, the question arose, whether a master had authority in a home port to make repairs. The point was not decided. *Parke*, B., stated that the court considered it an open question.

[2] Fitch *v.* Sutton, 5 East, 230; 2 Parsons on Contracts, 129 *et seq.*

[3] Teed *v.* Baring, Abbott on Shipping, 116.

If especial credit is given to one only of several part-owners, the others are not liable; but it must be clear that this was the intention of the creditor; that is, it must be certain that he not only intended to charge one, but intended also that the other part-owners should not be charged.[1] If the creditor knew but one, and for that reason charged him only, that we should not deem a sufficient discharge of the rest.[2] If the charge were to "ship and owners," and were in any way authorized by those who were owners, they are all held, whether known or unknown;[3]

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[1] *Ex parte* Bland, 2 Rose, 91; Baldney *v.* Ritchie, 1 Stark. 338; Stewart *v.* Hall, 2 Dow. 29; Thompson *v.* Finden, 4 Car. & P. 158; Hussey *v.* Allen, 6 Mass. 163; James *v.* Bixby, 11 Mass. 34; Muldon *v.* Whitlock, 1 Cow. 290; Cox *v.* Reid, 1 Car. & P. 602; Reed *v.* White, 5 Esp. 122. In Jennings *v.* Griffiths, Ryan & Moody, N. P. 42, the court go so far as to say: The true question is, upon whose credit was the work done. This will generally be determined by the legal ownership, but may be rebutted by proof that the defendant has parted with the beneficial ownership, and all management of the vessel. This doctrine is entirely overthrown in England. Numerous recent decisions settle the law now to be, that where repairs are ordered by one person, and another is sought to be charged, the only question is, whether the party ordering was held out by the other as his agent, for if not he cannot be held. Thus *Parke*, B., in Mitcheson *v.* Oliver, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, 232, says: "We have often said the expression, 'Upon whose credit the work was done, or the goods were supplied,' is an incorrect expression, and likely to mislead the jury; the correct mode of leaving the question to the jury is, 'who was the contracting party.'" See also, Myers *v.* Willis, 17 C. B. 77, 33 Eng. L. & Eq. 204; affirmed, 18 C. B. 886, 36 Eng. L. & Eq. 350; Brodie *v.* Howard, 17 C. B. 109, 33 Eng. L. & Eq. 146; Mackenzie *v.* Pooley, 11 Exch. 638, 34 Eng L. & Eq. 486.

[2] Thomson *v.* Davenport, 9 B. & C. 78.

[3] Miln *v.* Spinola, 4 Hill (N. Y.) 177. But it is perfectly clear that the fact of credit given, of which the charge "to the ship," or to "A. & B. owners of the ship Hero," or whatever the words used may be, is evidence, cannot, unless ratified or adopted by the party or parties intended, enure to charge them, if they are not otherwise liable. The only effect it can have is, on the one hand, to restrict the liability to one or more of several parties who would otherwise be answerable, by showing the intent of the creditor to look exclusively to those named, and of this it is at best but *primâ facie* evidence, and liable to be rebutted by proof that the repairs, etc., were credited to those named, because the furnisher knew of no others; and, on the other hand, where words sufficiently comprehensive are employed to embrace all those who for any reason are legally chargeable, as, "To the ship and all concerned." This is but evidence of an intent to preserve the remedy of the party entire, which the law will, generally at least, imply as well without it. In Jones *v.* Blum, 2 Rich. 475, supplies had been furnished for the ship by the plaintiff on a contract with one Stocker, who was the owner, but had mortgaged her to the defendants by a surrender of the old register, and taking out a new one in their names. He continued, however, in possession of her, and sailed her for his exclusive benefit until she was taken possession of by the defendants. The goods were charged in the plaintiff's books "to the Brig

and if the service is rendered to the ship, the fact that it is charged to one part-owner by name, might raise a presumption of intention to sell or work on his personal credit alone; but we should say that this presumption was removed by showing that no others were known, because this was, of itself, a sufficient reason, and a more probable reason for charging only one of many who are liable. For the same reason, if payment is made by the negotiable paper of one, which paper is dishonored, the others are liable.[1] In Maine and Massachusetts, the rule that

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Hayne, master and owners." The bill was presented to Stocker, and his note for the amount taken. Upon these facts, the court were of opinion that the plaintiff had contracted with, and given credit originally and exclusively to, Stocker. That, consequently, the defendants never were liable, and that the charge in the books could not make them so.

In this connection, the case of Scottin *v.* Stanley, 1 Dall. 129, is worthy of attention. A vessel had been put upon the stocks, and a contract entered into with the plaintiff for the painting by one Taylor, who subsequently interested the other defendants, Stanley and Carson, in a share of the vessel, but continued to act as ship's husband, receiving from them their share of the building and outfit. Subsequently he failed, and the plaintiff brought his action against all three. He had made his charges in his book "to Ship Hannah," and showed that on the 4th of April Stanly & Carson had engaged a captain for the ship. All the items of the account, but one, were dated subsequently to this act of ownership. Taylor offered to confess judgment; on the part of the other defendants it was contended, that reference should be had to the time of the contract made, which being when Taylor was sole owner, the plaintiff could resort to him alone; that no purchase made, or interest acquired afterwards, could make Stanley and Carson liable for a contract made with Taylor only, and on Taylor's sole credit, and that this case was particularly strong, it being proved that they had paid their proportions already to the ship's husband, Taylor. But *Shippen*, president, instructed the jury, that, as the work was performed after they had become owners, and appeared avowedly so, it was certainly done on their credit, and not only the ship's husband, but all the real owners at the time of the work done, were liable."

It is difficult to gather the precise ground on which this case stands, from the report. If, as might be inferred from the language of the court, the plaintiff recovered, not upon the original undertaking, but upon an implied assumpsit for work and labor done and materials furnished, for no new undertaking or ratification of the original contract by Stanley and Carson appears, they might be liable in respect of the benefit received; the question of credit given becomes then unimportant, being a mere inference of law. On the other hand, if they were charged as principals for the act of Taylor, as their agent, some other ratification than the mere acquisition of the ownership of the vessel seems requisite to the adoption of his previous contracts by them. It is possible that the plaintiff did not originally contract upon the mere personal credit of Taylor, of which the charge "to the Ship Hannah," if not an after-thought, might raise a presumption; but this would not, that we perceive, strengthen his claim as against the actual defendants. The probability is, that there existed circumstances in the case not reported. See also, upon this point, Henderson *v.* Mayhew, 2 Gill, 393.

[1] Higgins *v.* Packard, 2 Hall, 547; Muldon *v.* Whitlock, 1 Cow. 290; Schemer-

presumes negotiable paper to be intended as absolute payment, unless the contrary be shown, might be applied in the common law courts;[1] but we think it would not in the admiralty courts sitting in those districts.[2]

Insurers who accept an abandonment of a ship become thereby owners, and are liable as such;[3] but not *in solido;* for if there be many insurers, each is liable only for his proportion, unless he promises to pay more. The reason of the exception is, that the ownership is in this case cast upon them by misfortune and necessity, and, if not against their will, at least is not assumed by their free choice and voluntary action.[4]

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horn *v.* Loines, 7 Johns. 311; King *v.* Lowry, 20 Barb. 532; Patterson *v.* Chalmers, 7 B. Mon. 595. See also, Cheever *v.* Smith, 15 Johns. 276; Wyatt *v.* The Marquis of Hertford, 3 East, 147.

[1] Chapman *v.* Durant, 10 Mass. 47; French *v.* Price, 24 Pick. 13, 20; Wilkins *v.* Reed, 6 Greenl. 220; Descadillas *v.* Harris, 8 Greenl. 298; Newall *v.* Hussey, 18 Maine, 249. See also, Thacher *v.* Dinsmore, 5 Mass. 299; Maneely *v.* M'Gee, 6 Mass. 143; Goodenow *v.* Tyler, 7 Mass. 36; Whitcomb *v.* Williams, 4 Pick. 228; Reed *v.* Upton, 10 Pick. 522; Watkins *v.* Hill, 8 Pick. 522; Wood *v.* Bodwell, 12 Pick. 268; Ilsley *v.* Jewett, 2 Met. 168; Butts *v.* Dean, 2 Met. 76; Curtis *v.* Hubbard, 9 Met. 322, 328; Thurston *v.* Blanchard, 22 Pick. 18; Melledge *v.* Boston Iron Co. 5 Cush. 158; Varner *v.* Nobleborough, 2 Greenl. 121; Bangor *v.* Warren, 34 Maine, 324; Fowler *v.* Ludwig, 34 Maine, 455; Shumway *v.* Reed, 34 Maine, 560; Gilmore *v.* Bussey, 3 Fairf. 418; Comstock *v.* Smith, 23 Maine, 202. See also the learned opinion of Mr. Justice *Sprague*, sitting as referee, in the case of Page *v.* Hubbard, 19 Law Reporter, 607. But this rule never applies to notes not *negotiable*. Trustees, &c. *v.* Kendrick, 3 Fairf. 381; Edmond *v.* Caldwell, 15 Maine, 340. In the case of The Barge Resort *v.* Brooke, 10 Mo. 531, it was held, that it was competent evidence, in a suit against a boat, on a note given by a former owner for services, to show that the note was given and accepted as the individual note of such former owner, and for this purpose the maker of the note was a competent witness. See also, Reed *v.* White, 5 Esp. 122.

[2] See Wallace *v.* Agry, 4 Mason, 336; The Barque Chusan, 2 Story, 455; The Brig Nestor, 1 Sumner, 73, 87; Leland *v.* The Medora, 2 Woodb. & M. 92; Macy *v.* De Wolf, 3 Woodb. & M. 193; The Eastern Star, Ware, 185.

[3] United Ins. Co. *v.* Robinson, 2 Caines, 280; United Ins. Co. *v.* Scott, 1 Johns. 106; Reade *v.* Com. Ins. Co. 3 Johns. 352; Lee *v.* Boardman, 3 Mass. 238, 247; Emerig. on Ins. ch. 17, s. 6, § 1, (Meredith, Ed. p. 684); Pothier, Contrat d'Assurance, n. 138.

[4] United Ins. Co. *v.* Scott, 1 Johns. 106, 110. Mr. Justice *Thompson*, in this case, states the law with great accuracy. He says: "It cannot be controverted, that the underwriters upon the ship, after the abandonment and acceptance, became owners thereof, and answerable for all necessary repairs and expenses. The acceptance must, I think, have a retroactive effect, and the underwriters be deemed owners from the time the accident happened. They cannot, however, be considered joint-owners, so as to constitute them partners, or so as to make them responsible, one for the other. It cer-

SECTION IV.

OF THE LIABILITY OF PART-OWNERS FOR THE TORTS OF THOSE WHOM THEY EMPLOY.

The liability of part-owners of a ship for the torts of those whom they employ, or of each other, is governed by the principles of the law of agency. There may be something in the peculiar nature of this property, or in the powers and duties of those who are placed in charge of it, which, in particular cases, will, to some extent, qualify this law. But we are not aware that any questions of this kind have arisen, which this law of agency, rationally considered, has not sufficed to answer. The persons employed about the ship are the agents or servants of all the owners, and each owner is, to a certain extent, the agent and servant of the rest. Now every principal or master is liable for the torts of his servant or agent, if they were committed in the execution of the service or agency; or, in other words, if committed by the servant or agent by express order of the master, or in the discharge of the general duties belonging to such agent or servant; but not if they are the torts of one who is their agent or servant, but who, in this wrong doing, did not act as such agent or servant.[1] If a master or part-owner, while employed about a vessel, by a gross and faulty negligence set fire to one adjoining, or force her upon a rock or shore, or cause a collision, all the owners are answerable *in solido;* but

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tainly will not be pretended, that because they subscribed the same policy, they thereby became joint partners; they are total strangers to each other; and if being on the same policy would not constitute them partners, I cannot see why accepting the abandonment should make them such. If the loss happens by any of the perils insured against, the underwriters are bound to pay their subscription, whether they accept the abandonment or not; and if the acceptance constitutes them partners, they are driven to the alternative of relinquishing the subject insured, or of becoming partners, and, of course, responsible for whomsoever may be on the same policy. A doctrine leading to such consequences never can be tolerated."

[1] Bowcher *v.* Noidstrom, 1 Taunt. 568; M'Manus *v.* Crickett, 1 East, 106; Lyons *v.* Martin, 8 A. & E. 512; Middleton *v.* Fowler, 1 Salk. 282; Jones *v.* Hart, 2 Salk. 441; Anonymous, 1 Ld. Raym. 739; Hazard *v.* Israel, 1 Binn. 240; Quarman *v.* Burnett, 6 M. & W. 499. See also, cases *infra.*

not if the same act were done by the same persons intentionally, and without any connection with the ship or any service rendered on board of her.

To illustrate this rule, if we suppose that a part-owner who is in charge of a ship, and clearing out a stove in a ship in the night time for the benefit of the ship, throws living embers out of his own ship in such a way that they fall on board of an adjoining vessel, which is thereby burned, all the owners of the ship might, on general principles, be liable for this *in solido*. But if he took these embers from the stove for the purpose of setting fire to the other vessel, and executed this purpose, this would be his own felonious act, for which he alone would be responsible.[1]

SECTION V.

OF THE LIABILITY OF PART-OWNERS TO EACH OTHER.

Part-owners are not, at common law, liable to each other for injury or loss to their common property by negligence. The reason given is, that each cotenant may protect himself, and need not leave the property in the uncontrolled possession of the other, unless he choose to do so; and if he does so choose, he must take the consequences. He has, therefore, no right of action if his cotenant or part-owner loses or injures the property by his gross negligence; although he would have it, if the cotenant had wilfully destroyed the property.[2] But this rule is rather technical than just, and we doubt whether it would be applied in admiralty; especially as the civil law, which is the common law of these courts, makes no such distinction.[3]

Where part-owners agree to fit out a vessel and load her for a voyage at their common expense and for their common profit, and one of them fails to advance his share, and then becomes bankrupt before the adventure is closed, the part-owners do not

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[1] See post, ch. 11, § 3.

[2] See ante, p. 85, note 1.

[3] Domat's Civil Law, by Strahan, § 1489, Cushing's ed. vol. 1, p. 584.

pay over to his assignees all his profit, and take their dividend on the deficit of his advances; but they have a kind of lien on the adventure, for they may first deduct from his share of the profit whatever stands charged to him on account of the expenses and disbursements, and then pay over only the balance to the assignees.

This right of deduction is said to be confined to that very adventure, and not to extend to any former or general balance or indebtedness. But this question has been much discussed, and the authorities are quite conflicting. Probably in each case the decision would be much affected by the circumstances, as they showed a general partnership, or quasi partnership, or a partnership limited with all its rights and liabilities to that special adventure. Indeed, beside limiting the lien of part-owners of ship, as above stated, we should perhaps be justified by the best authorities in saying that part-owners have no lien *as such;* that is, none, excepting so far as they are in fact partners.[1]

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[1] We have seen that part-owners of a ship may hold the same in partnership, but that such is not their necessary nor even their *primâ facie* relation to each other. The only point really decided in the much discussed case of Doddington *v.* Hallet, 1 Ves. Sen. 497, Belt's Sup. to Ves. 205, 2 Rose. 78 (n), whether rightfully or wrongfully decided, was, that the connection in that instance was one of partnership. That being decided, the existence of the lien resulted from it as a necessary consequence, according to the principles common to all copartnerships. See the remarks of *Spencer,* C. J., on this case in Mumford *v.* Nicoll, 20 Johns. 611, 633. All that later English cases have done seems to have been to contest the application of those principles to that particular case, and we apprehend that it was not intended to, and does not authorize the doctrine that part-owners of a vessel, *as such,* have any lien on the ship whatever. The contrary seems to be settled by the cases, both in England and America. Ex parte Young, 2 Ves. & B. 242; Ex parte Harrison, 2 Rose, 76; 2 Bell's Comm. Sect. 1221, § 4; Nicoll *v.* Mumford, 4 Johns. Ch. 522; Braden *v.* Gardner, 4 Pick. 456; Merrill *v.* Bartlett, 6 Pick. 46; Thorndike *v.* De Wolf, 6 Pick. 120; Patton *v.* The Sch. Randolph, Gilpin, 457. In all the cases where the existence of the lien was recognized, the court were of opinion that there existed upon the facts a partnership between the parties for the purposes of the action. See Smith *v.* De Silva, Cowp. 469; Holderness *v.* Shackels, 8 B. & C. 612; Mumford *v.* Nicoll, 20 Johns. 611; Hewitt *v.* Sturdevant, 4 B. Mon. 458; and although in Mumford *v.* Nicoll the judges go out of their way to express an opinion favorable to the existence of such a lien; they expressly state that their decision is based upon the existence of a partnership in the case before them; hence that opinion is merely *obiter.* See also, Seabrook *v.* Rose, 2 Hill's Ch. 553. Where the part-owners of a ship are engaged in a joint enterprise, this does not necessarily create a partnership in the ship which is an instrument of that enterprise.

Thus in Holderness *v.* Shackels, it is expressly stated by Ld. *Tenterden,* C. J., that the

SECTION VI.

OF THE SHIP'S HUSBAND.

The ship's husband is usually, but not necessarily, a part-owner. He is the general agent of the owners in respect to the ship, and may be appointed, like other agents, by a written instrument or orally. Or his appointment may be inferred from his exercising the duties of his office with the knowledge and

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claim of lien is not on the ship, but on the proceeds of their common adventure, — in that case, a quantity of oil, with regard to which he considered the defendants as standing in the relation of copartners to each other.

In Mumford *v.* Nicoll, the partnership was held to extend not only to the fruits of the voyage, but to the ship itself, on the ground that such was the agreement of the parties. "It is true," says *Woodworth*, J., "the appellant and Stillwell were tenants in common, and part-owners of the ship; and if no further connection appeared, the question would be very different from the one which arises in this case. It is admitted that here the parties were partners in the cargo and voyage; is it not equally clear they were so in the vessel? *It is not the case of a vessel being chartered or earning freight co nomine, but the vessel is to be sold, as well as the cargo;* the avails of both are to be invested in such a manner as the master may consider most advantageous. This has been carried into effect. . . . . After all this, to say that in respect to the ship the appellant and Stillwell stand as tenants in common and part-owners merely, and that the ship formed no part of the partnership property, is to my mind a proposition not founded in fact."

And further on he adds: "I consider these parties as commencing the business of a limited partnership in vessels, cargoes, and trading voyages. After having sent out one vessel and cargo, they proceed to a second, and then to a third. To say that each vessel and cargo is to be considered as being the subject of a distinct and separate partnership, rather than parts and parcel of the same transactions, does not appear to me warranted by the evidence." But in this last opinion the majority of the court did not concur.

Spencer, C. J., in delivering their opinion, is, however, equally explicit. "I must not be supposed to overrule," he says, "the distinction between partners in goods and merchandise and part-owners of a ship. The former are joint-tenants, and the latter are, generally speaking, tenants in common; and one cannot sell the share of the other. But I mean to say, that part-owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship; and if they are to be so regarded, the right of one to retain the proceeds, until he is paid what he has advanced beyond his proportion, is unquestionable."

In the case of The Larch, 2 Curtis, C. C. 427, it was held that a part-owner, though ship's husband, has not a lien on the share of his tenant in common for advances and disbursements. See also, Sterling *v.* Hanson, 1 Cal. 478.

consent of the owners. These duties are determined by usage.[1] They are, in general, to provide for the complete sea-worthiness of the ship; to take care of her in port; to see that she has on board all necessary and proper papers; to make contracts for freight, and collect the freight and all returns.[2] He cannot borrow money;[3] nor give up the lien for freight;[4] nor insure, nor purchase a cargo for the owners,[5] without especial authority;[6]

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[1] 1 Bell, Comm. p. 410, 4th ed.

[2] These duties are thus enumerated by Mr. Bell, 1 Comm. 410, § 428 (4th ed.); id. p. 504 (5th ed.). 1. To see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a sea-worthy ship. 2. To have a proper master, mate, and crew for the ship, so that in this respect it shall be sea-worthy. 3. To see to the due furnishing of provisions and stores, according to the necessities of the voyage. 4. To see to the regularity of all the clearances from the custom-house, and the regularity of the registry. 5. To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. 6. To enter into proper charter-parties, or engage the vessel for general freight, under the usual conditions; and to settle for freight and adjust averages with the merchant. 7. To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters, and to keep regular books of the ship.

See also, on this subject, Sims *v.* Brittain, 4 B. & Ad. 375; Owston *v.* Ogle, 13 East, 538; Benson *v.* Heathorn, 1 Young. & C. 326; Turner *v.* Burrows, 8 Wend. 144, 151; Gould *v.* Stanton, 16 Conn. 12, 23. In Benson *v.* Heathorn, *supra*, it was held by the court of chancery that for one of several managing directors of a joint-stock company for the acquisition and employment of vessels to take on himself the office of ship's husband was *primâ facie* a breach of trust; as his interest in the one capacity was in conflict with the duty he owed the company in the other, and that he could not in consequence be allowed to make the usual charges against them for his services as ship's husband. But in Smith *v.* Lay, 3 Kay & Johns. 105, it was held that the owner of a majority of shares in a ship might constitute himself managing owner, and, in that capacity, act as broker to the ship in collecting and distributing freight, there being nothing incompatible between such services and his fiduciary character as managing owner. But the court, before allowing him a commission for these services, directed an inquiry whether, according to the custom of ship-owners or otherwise, he, being managing owner, was entitled to any, and if so, what commission.

Where there was an agreement between part-owners that one of them should have the exclusive management of the vessel as ship's husband, and that, after her return, a full account should be made out of the ship and her concerns, and the net profits, after all charges had been deducted, should be divided amongst the owners; it was held that this duty devolved upon the ship's husband, and that for not so accounting and dividing the profits an action lay against him by each of the part-owners. Owston *v.* Ogle, *supra*. So the agreement between the managing and other part-owners will be enforced in chancery. Darby *v.* Baines, 9 Hare, 369, 12 Eng. L. & Eq. 238.

[3] 1 Bell, Comm. 411, (4th ed.).

[4] 1 Bell, Comm. 411, (4th ed.).

[5] Hewett *v.* Buck, 17 Maine, 147.

[6] Ogle *v.* Wrangham, *coram Kenyon*, C. J., Guildhall Sitting, H. T. 1790, Abbott

but if he makes such insurance, the parties for whose benefit this insurance is made may ratify this insurance for their own benefit; and it is said that they may do this even after a loss.[1] A ship's husband cannot delegate his authority;[2] and it is said that he cannot commence and prosecute an action at law, and bind the owners to the expenses,[3] but this we doubt.

If a part-owner, who is also ship's husband, advances the share in the outfit of another part-owner, he may sue that part-owner; but has no lien on the ship therefor.[4]

The ship's husband, (called, in our statutes of registration, the managing owner,) being the general agent of the other owners, binds his principals, while acting within his authority; but a creditor may waive their liability, and trust to him alone; and he will be estopped from denying this, and setting up a claim against the other owners, if he has dealt with the agent in such a way as to justify the principals in believing that he dealt with the agent on his personal credit only, and therefore has permitted them to settle their accounts with their agent in

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on Shipp. 107; French *v.* Backhouse, 5 Burr. 2727; Bell *v.* Humphries, 2 Stark. 345; Turner *v.* Burrows, 5 Wend. 541; s. c. 8 Wend. 144; Patterson *v.* Chalmers, 7 B. Mon. 595; Foster *v.* U. S. Ins. Co. 11 Pick. 85; Robinson *v.* Gleadow, 2 Bing. N. C. 156. And therefore, where he has insured in the name of, and for the benefit of the part-owners, he cannot recover from them the amount of the premium he has paid. Cases *supra*.

[1] Hagedorn *v.* Oliverson, 2 M. & S. 485; Routh *v.* Thompson, 13 East, 274. And see post, chapter on insurance. But one partner of a firm which owns a vessel may effect insurance for all. Hooper *v.* Lusby, 4 Camp. 66.

[2] Mr. Bell, in treating of the limitations of the powers of a ship's husband, says: "1. That, without special powers, he cannot borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them. 2. That, although he may, in the general case, levy the freight, which is, by the bill of lading, payable on the delivery of the goods, it would seem that he will not have power to take bills for the freight and give up the possession and lien over the cargo, unless it has been so settled by charter-party, or unless he has special authority to give such indulgence. 3. That, under general authority as ship's husband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority. 4. That, as the power of the master to enter into contracts of affreightment is superseded in the port of the owners, so is it by the presence of the ship's husband, or the knowledge of the contracting parties, that a ship's husband has been appointed." 1 Bell, Comm. 411, § 429 (4th ed.); 1 Bell, Comm. 504, 505, (5th ed.).

[3] Campbell *v.* Stein, 6 Dow, 116, 135.

[4] Helme *v.* Smith, 7 Bing. 709.

such a way as to be damnified, if made responsible to the creditor.[1]

If a ship's husband be not a part-owner, then he is the common agent of all the owners, and all the owners are responsible to him *in solido* for his just charges, on the general principles of agency. If he be a part-owner, each is liable for his share,[2] and we should say, that, if one or more became bankrupt, each of the solvent owners would be held, in equity and in admiralty, to make good his share of the insolvent's deficit, the ship's husband himself sustaining his own share of the loss by the bankruptcy and no more; agreeably to the rule of equity in cases of contribution.

As to the lien of the ship's husband, it may not be quite certain. If a partner, then he has the lien of a partner; if not, he may have a lien on the proceeds of a voyage, or of the ship itself if sold, or on her documents, provided any of these have come into his actual possession. And this lien covers all his actual expenses and disbursements for the ship, and his indemnity for any obligation incurred for the ship. But it is doubtful whether the mere office of ship's husband gives him any lien.[3]

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[1] Thompson *v.* Finden, 4 Car. & P. 158; Muldon *v.* Whitlock, 1 Cow. 290; Reed *v.* White, 5 Esp. 122. See also, Wyatt *v.* Marquis of Hertford, 3 East, 147; Cheever *v.* Smith, 15 Johns. 276.

[2] Helme *v.* Smith, 7 Bing. 709. See also, Brown *v.* Tapscott, 6 M. & W. 119.

[3] It would, indeed, seem that the ship's husband *as such* cannot have any lien on the vessel, or the proceeds thereof. The Larch, 2 Curtis, C. C. 427; Ex parte Young, 2 Ves. & B. 242; Smith *v.* De Silva, Cowp. 469. In this last case, the outfit of a vessel had been conducted by De Silva, who was appointed to manage the concern as ship's husband in pursuance of an agreement made by three others at the time of their becoming owners of the ship; and De Silva settled the accounts with them, and took from one of them, who afterwards became bankrupt, promissory notes payable at a future day for a part of his share of the expense. Lord Mansfield held, that the assignees of the bankrupt were entitled to receive his full share of the profits. The ship's husband, subsequently to this transaction, had acquired an interest in the ship by purchasing a part of the share of one of the other part-owners. (The time when he acquired that interest does not distinctly appear in the report of the case; but Lord Tenterden, in his remarks on this case in Holderness *v.* Shackels, states it to have been subsequently to the taking of the note.) It was held that he was entitled only to a dividend under the commission for the amount of the notes. In this case, no distinction was made between the bankrupt's share in the ship, which was sold in the course of the voyage, and his share in the profits of the adventure; but it seems now settled that on the latter the ship's husband has a lien for the expenses incurred in the outfit, &c. Holderness *v.* Shackels, 8 B. & C. 612; Gould *v.* Stanton, 16 Conn. 12, 23; Macy *v.* De Wolf, 3 Woodb. & M. 193, 210. And there seems to be no valid

It is undoubtedly the duty of a ship's husband to obtain from each part-owner his share or contribution towards the payment of any general charge that he has made. And if he himself advances the share or contribution of any part-owner, he may sue him for it.[1]

SECTION VII.

OF THE LIENS OF PART-OWNERS, AND OF ACTIONS BY AND AGAINST THEM.

There is much reason, and some authority, for giving to part-owners a general lien on their common property for all their just and reasonable charges or balances of accounts against each other in relation to their common property. Indeed, there might seem to be some reason for extending such a rule to all cases of cotenancy of chattels. But there is no authority whatever for it in respect to common chattels; and in regard to cotenancy in a ship, we have no doubt that the prevailing authority of the courts, as well as the general usage of merchants, gives no such lien. In other words, part-ownership is one thing, and partnership another, whether in relation to ships or other property. These two modes of ownership may be perfectly separate and distinct; and when they are so in fact, and by the intention and understanding of the parties, both the common law and the law merchant keep them so. They may run together, absolutely, as when a ship is held as a part of the stock of a copartnership, or partially, or specially, as in the case of the joint adventures or quasi partnerships which we have already considered. And in these latter cases, the rules of the law of partnership, at least in courts of equity or admiralty, would be applied, so far as the merits and substantial justice of each case required their application. It has been adjudged, that, where two

reason why this lien should not extend to the proceeds of the ship where her sale during, or at the end of the voyage, is contemplated and effected as a part of the adventure.

[1] See cases ante, p. 100, n. 2.

persons build a ship together, to be owned by them in certain proportions, and one of them advances more than his proportion, he has no lien on the ship for the balance due to him.[1] And elsewhere it has been expressly denied that a part-owner has a lien on the shares of other owners for his advances on account of a voyage.[2] The cases are in irreconcilable conflict on this subject. Most of them are complicated with the question, how far part-owners may be treated as copartners.[3] But we should say, that, if a part-owner, or even if a ship's husband, who is not an owner, makes advances for a certain voyage, and then comes into possession of the proceeds of that voyage, he should have a lien on them for his advances, by the general principles of agency; and as between the cases which admit and those that deny that a part-owner, merely as such, has a lien on the ship for his advances, while the more numerous authorities agree that there is no such lien, we cannot but think that those who favor it, — we may name Hardwicke in England,[4] and Story here,[5] — find some reason for their opinion in the nature of the property and of the ownership. But no principle will go so far in reconciling the leading cases on this subject as this; a part-owner, merely *as such*, has no lien whatever; but acquires such a lien when any of the elements of partnership or agency with

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[1] Merrill *v.* Bartlett, 6 Pick. 46.

[2] Braden *v.* Gardner, 4 Pick. 456.

[3] See Doddington *v.* Hallet, 1 Ves. Sen. 497; *Ex parte* Young, 2 Ves. & B. 242; *Ex parte* Harrison, 2 Rose, 76; *Ex parte* Parry, 5 Ves. 575; Nicoll *v.* Mumford, 4 Johns. Ch. 522, reversed 20 Johns. 611, and n. 1, p. 96. This may, perhaps, be regarded as one of the instances in which the common law has refused to yield to the exigencies of the law merchant, and in which some mischief has been the result of the conflict. The argument appears to have stood thus. A copartner certainly has a lien on the common property for his charges and expenses; a cotenant of a chattel certainly has not. A part-owner of a ship is but a cotenant of a chattel, and therefore has no such lien. But when cases involving this question came before the courts, it was apparent that the principles and reasons which gave this lien to a copartner applied with more or less force to a part-owner of a ship. And while the courts usually, or, at least, for the most part, have adhered to the rule that a part-owner has no lien, they have in some instances disregarded it, and in others admitted exceptions on very narrow grounds. We cannot but think it would have been better if the whole had been conceded, and a part-owner of a ship permitted to have his lien on the ship for his expenses and charges on account of the ship. But this certainly is not the law, as settled by the authorities.

[4] Doddington *v.* Hallet, 1 Ves. Sen. 497.

[5] Story on Partnership, § 441, 443.

bailment, upon which a lien may rest, enter into his relation with the other part-owners.

So, too, the admission or acknowledgment of a partner, in relation to the business of the firm, binds all the partners.[1] But this rule has been held not applicable to the case of a part-owner of a ship;[2] although we have no doubt it would be applied, with other principles of copartnership, to cases of part-ownership, to which particular circumstances gave a character of partnership. So it has been the custom for part-owners of a ship to bring a bill against each other in equity for adjustment of accounts, in like manner as is done by partners.[3] And although some doubt is cast upon the admiralty jurisdiction of this question in England,[4] there can be none whatever as to our own admiralty courts. All part-owners should join in an action for a tort committed against all; but if they do not, no advantage can be taken of the non-joinder, except by a plea in abatement.[5]

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[1] Story on Partnership, § 107.

[2] Jaggers *v.* Binnings, 1 Stark. 64.

[3] Story on Partnership, 449; Moffatt *v.* Farquharson, 2 Brown's Ch. 338; Good *v.* Blewitt, 13 Ves. 397.

[4] The Apollo, 1 Hagg. 306, 313, per Ld. *Stowell.*

[5] Cabell *v.* Vaughan, 1 Wms. Saund. 291, g; Dockwray *v.* Dickenson, Comb. 366; Child *v.* Sands, 1 Salk. 31; Addison *v.* Overend, 6 T. R. 766; Sedgworth *v.* Overend, 7 T. R. 279; Barnardiston *v.* Chapman, cited 4 East, 122; Wheelwright *v.* Depeyster, 1 Johns. 472; Hart *v.* Fitzgerald, 2 Mass. 509; Thompson *v.* Hoskins, 11 Mass. 419; Patten *v.* Gurney, 17 Mass. 182.

In Addison *v.* Overend, *supra*, Ld. *Kenyon* held that it made no difference in this respect, that the defect appeared on the plaintiff's declaration. The succeeding case of Sedgworth *v.* Overend was an action brought by the remaining part-owner, who had not joined in the first action against the same defendant for the injury to his share in the ship. The non-joinder was now pleaded in abatement, to which the former recovery was answered, and upon demurrer the court were of opinion that the plea was bad. *Lawrence*, J., remarking: "The defendants, not having pleaded in abatement in the first action, cannot now make this objection; by omitting to plead in abatement then, they assented to the severance of the actions. There might have been greater weight in this objection, if there had been several remaining owners, and only one of them had sued; but here the whole remaining interest in the ship is vested in this plaintiff; however, if there had been several remaining part-owners, I do not think the defendants could ever have objected to the severance of the actions after they had omitted to plead in abatement in the first action." In Phillips *v.* Claggett, 10 M. & W. 102, the declaration contained ten counts. The first five were in trover; the rest set forth that the plaintiffs having employed the defendant at his request, for reward, as agent or factor, to receive and take into his possession certain goods belonging to the plaintiffs, the defendant misconducted himself after the receipt thereof, in and about the care and disposal of the same, and by reason of such misconduct they became and were

If, however, the action is for freight, or on any contract, the defendant may show the non-joinder in evidence under the general issue.[1] But part-owners of a ship may be sued separately on separate covenants.[2]

If an action is brought against part-owners of a ship on a contract, and all are not joined, if the defendants do not avail themselves of the non-joinder by a plea in abatement, they cannot afterwards.[3] It is now well settled, that an action of tort can

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wholly lost to the plaintiffs. The defendant pleaded in abatement to the whole declaration, that the goods therein mentioned were not the property of the plaintiffs only, but were the joint property of the plaintiffs and two other persons. On demurrer the court ordered a judgment of *respondeat ouster*, on the ground that the plea was no answer, except to the first five counts, and that, being bad as to part, it was bad as to the whole.

[1] In Stanley *v.* Ayles, 3 Keb. 444, *Hale*, C. J., was of opinion that *indebitatus assumpsit* by one joint-owner of a ship for his share of the freight was joint or several at the plaintiffs' election, and that evidence of the custom of merchants to bring it alone was sufficient. It seems, however, well settled, that, where the contract is joint, either by agreement or implication, as where the part-owners are general partners or quasi partners in the particular adventure, they must sue together. "The necessity of all the part-owners joining as plaintiffs in the suit in this case," says *Abbott*, in his treatise on Shipping, p. 115, "is founded upon the consideration, that all of them are partners with respect to the concerns of the ship." Perhaps it is more accurate to say that the part-owners are all parties to the contract, which relates to the use of the property which they hold as tenants in common. And if they do not, it need not be pleaded in abatement, but may be shown under the general issue. Hart *v.* Fitzgerald, 2 Mass. 509; Austin *v.* Walsh, 2 Mass. 401; Peters *v.* Davis, 7 Mass. 257; Baker *v.* Jewell, 6 Mass. 460; Robinson *v.* Cushing, 2 Fairf. 480.

In Baker *v.* Jewell, *supra*, the court were of opinion that the want of proper plaintiffs in actions of contract is an exception to the merits, and is to be taken advantage of either upon demurrer, in bar, or on the general issue, but not in abatement. The other cases seem, however, to consider that it may be so pleaded. In *replevin*, all must join, and if they do not, the court will abate the writ *ex officio*. Hart *v.* Fitzgerald, *supra*.

[2] Servante *v.* James, 10 B. & C. 410, where the part-owners of a vessel agreed to load and despatch her on a voyage, the loss or profits arising from which were to be shared in proportion to the lading they respectively put on board, it was held, that a third person, who promised expressly to pay to each his share, could not object to an action by some of them, that they were partners. Bunn *v.* Morris, 3 Caines, 54.

[3] "Formerly, indeed," remarked Ld. *Kenyon*, in Addison *v.* Overend, 6 T. R. 766, 770, "especially in cases of contract, it was held, that, if it appeared at the trial that there was a joint contract, and only one of the contracting parties was sued, it was a decisive objection against the plaintiff's action. But afterwards, for the convenience of the suitors, on considering the principles on which those decisions proceeded, it was held, that, if a defendant meant to avail himself of such an objection, he must plead in abatement." See also, Boson *v.* Sandford, 2 Show. 478, 2 Salk. 440, 3 Mod. 321; Govett *v.* Radnidge, 3 East, 62; Rice *v.* Shute, 5 Burr. 2611; Abbot *v.* Smith, 2 Wm. Bl. 947; Marquand *v.* Webb, 16 Johns. 89; Hathaway *v.* Russell, 16 Mass.

be maintained against one or more part-owners, as well as against all.[1]

If an action, which should be brought against all the part-owners of a ship, is brought against some only, and they satisfy the judgment recovered, they will have an action for contribu-

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473; Converse *v.* Symmes, 10 Mass. 377; Robertson *v.* Smith, 18 Johns. 459; Ziele *v.* Campbell, 2 Johns. Cas. 382.

But where to a declaration in assumpsit, alleging that the defendants A. and B. being owners of one fourth part of a certain vessel, and that C. D., etc., being owners of the other three fourth parts, the several owners individually, in their several proportions, and the defendants jointly, in their said proportion, promised the plaintiff to pay him for certain repairs of the vessel by him performed; and averring that the other owners had paid, but that the defendants had not paid, the defendants pleaded in abatement that it appeared by the plaintiff's own showing, that there were other persons liable who ought to have been joined, and subsequently, from a judgment of "*respondeat ouster*," appealed, the judgment was affirmed. Barstow *v.* Fossett, 11 Mass. 250.

[1] One part-owner cannot, therefore, plead in abatement that there are others who should be joined with him. An exception to this is where land is held in common, and the title is put in controversy by the suit. 1 Chitty on Plead. 75; Mitchell *v.* Tarbutt, 5 T. R. 649; Low *v.* Mumford, 14 Johns. 426; Patten *v.* Gurney, 17 Mass. 182.

But where the declaration assumes the form of an action *ex delicto*, alleging a breach of duty and not a breach of contract, the question has arisen, and has been the subject of much discussion in England, whether one part-owner who is sued alone can plead in abatement that there are others who should have been joined with him. The question being, whether the tort or breach of the duty resulting from the contract is to be considered as the gist of the action, instead of the contract itself. It was held in Govett *v.* Radnidge, 3 East, 62, that the plea was not available. This was in the Court of King's Bench. Subsequently, the court of common pleas decided the opposite way. Powell *v.* Layton, 5 B. & P. 365; and in another case, that a plaintiff who failed to prove all the defendants to be part-owners could not recover at all. Max *v.* Roberts, 5 B. & P. 454. This case was afterwards argued in the King's Bench and in the Exchequer Chamber before all the judges. It is stated by the reporter that a difference of opinion was understood to prevail among them upon this question. The case, however, went off on a collateral point. Max *v.* Roberts, 12 East, 89. In the subsequent case of Weall v. King, 12 East, 452, the plaintiff declared in case, alleging a deceit to have been effected upon him by means of a warranty made by two defendants upon a *joint sale* to him by both of sheep, their joint property, it was held that the plaintiff could not recover upon proof of a contract of sale and warranty by one only, as of his separate property, as the action, although laid in tort, was founded on the joint contract alleged. See also, Leslie *v.* Wilson, 3 Brod. & B. 171; Bretherton *v.* Wood, 3 Brod. & B. 54. In Pozzi *v.* Shipton, 8 A. & E. 963, the court say: "We purposely abstain from giving any opinion, whether the doctrine in Govett *v.* Radnidge, or that in Powell *v.* Layton, be the true doctrine, as we do not feel ourselves called upon to decide between them, supposing them to differ." In Connecticut, declarations in the form of tort, stating the injury to have been effected by breach of a contract, have been sustained. Stoyel *v.* Westcott, 2 Day, 418; Bulkley *v.* Storer, 2 Day, 531.

tion against those who do not pay. If persons are joined who did not contract, or were not contracted with, this misjoinder may be shown, either by defendants or plaintiffs, on the general issue, and it is a fatal variance.[1]

In fourteen of our Western and Southern States, actions may be brought against vessels by name. They are Georgia,[2] Florida,[3] Alabama,[4] Arkansas,[5] Kentucky,[6] Ohio,[7] Michi-

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[1] Spalding *v.* Mure, 6 T. R. 363; Tom *v.* Goodrich, 2 Johns. 213; Livingston's Ex'rs *v.* Tremper, 11 Johns. 101; Jordan *v.* Wilkins, 2 Wash. C. C. 482.

[2] Act of Dec. 11, 1851, Hotchkiss, Stat. Law, 625. See Robinson *v.* Steamer Lotus, 1 Kelly, 317; Butts *v.* Cuthbertson, 6 Ga. 159; Adkins *v.* Baker, 7 Ga. 56.

[3] Stat. of 1847, Thomps. Dig. 414. See Flint River Steamboat Co. *v.* Roberts, 2 Florida, 102.

[4] Act of 1836, Clay's Dig. 139. See Steamboat Robert Morris *v.* Williamson, 6 Ala. 50; George *v.* Skeates, 19 Ala. 738.

[5] Rev. Stat. ch. 14. In a suit by attachment against a boat, the plaintiff should declare on the contract as having been made by the party making it, as the case may be, and not as made by the boat, but the attachment must run against the boat by name or description. Holeman *v.* Steamboat P. H. White, 6 Eng. 237. See also, Steamboat Napoleon *v.* Etter, 1 Eng. 103; Steamboat P. H. White *v.* Levy, 5 Eng. 411.

[6] Act of 1839, 3 Stat. Law, 112; Act of 1841, 3 Stat. Law, 113. See Strother *v.* Lovejoy, 8 B. Mon. 135.

[7] Ohio Stat. Swan's ed. ch. 26, p. 185; Curwen's Stat. in force, 503. This statute has been held to be constitutional. Keating *v.* Spink, 3 Ohio State, 105. It substitutes the boat for the owner, and authorizes suit against it by name for all money demands against the owner arising from debts contracted on account of, or for the use of the boat, or for injuries resulting to passengers or property by the boat, or from misconduct of officers and crew. The Canal Boat Huron *v.* Simmons, 11 Ohio, 458. In a suit against a boat, however, the controversy is really and practically between the plaintiff and the owners, and the provisions of the code applicable to parties in other suits apply. Young *v.* Steamboat Virginia, 1 Handy, 156. It only establishes the liability of the craft, but gives no lien prior to its seizure. Scott *v.* The Plymouth, 1 Newb. Adm. 56; Wick *v.* The Samuel Strong, 1 Newb. Adm. 188. Therefore claims against the vessel are to be satisfied in the order of actual seizure by warrant. Jones *v.* Steamboat Commerce, 14 Ohio, 408. In this case, and in that of Steamboat Waverly *v.* Clements, 14 Ohio, 28, it was held that a purchaser of a craft with notice of a debt or liability created or incurred on account of it by the original owner, takes it subject to such debt, but that a judicial sale vests the title in the purchaser free from all liability to be again proceeded against under the statute for a claim existing at the time of the sale. It was decided in Kellogg *v.* Brennan, 14 Ohio, 72, that a mortgagee of a craft has not a lien to be preferred to the claims of creditors, especially if the vessel is running for the joint interest of owners and mortgagees. So also in Provost *v.* Wilcox, 17 Ohio, 359. An action does not lie against the boat for money loaned; nor for breach of an executory contract for the transportation of goods where the goods are not delivered to the vessel, and where, therefore, the obligations of a carrier have not arisen. Dewitt *v.* Schooner St. Lawrence, 3 Ohio State, 325. The statute does not extend to a claim for salvage, but if the boat receives the property saved, and promises

gan,[1] Indiana,[2] Illinois,[3] Missouri,[4] Mississippi,[5] Iowa,[6] Wis-

to pay a certain sum, an action can be maintained against the boat for this. Boyd *v.* Steamboat Falcon, 1 Handy, 362. In Lewis *v.* Schooner Cleveland, 12 Ohio, 341, the statute was held to apply to the recovery of seamen's wages. See also, generally, Wayne *v.* Steamboat Gen. Pike, 16 Ohio, 421; Steamboat Albatross *v.* Wayne, 16 Ohio, 513; Schooner Argyle *v.* Worthington, 17 Ohio, 460.

[1] The first statute in Michigan, relative to this subject, was passed in 1839 (Sess. L. 1839, p. 70). This was repealed in 1846, (R. S. ch. 122.). Under the statute of 1839, it is held that there is no lien until the vessel is attached. Robinson *v.* Steamboat Red Jacket, 1 Mich. 171; Moses *v.* Steamboat Missouri, 1 Mich. 507. In declaring upon a bond executed under § 13, ch. 122, R. S., it is not necessary to aver that the plaintiff made the application in writing in the manner and form required by sections two and three of said chapter. Nor is it necessary to aver that the vessel released upon the execution of the bond was, at the time of its seizure, within the jurisdiction of the court. Truesdale *v.* Hazzard, 2 Mich. 344. See also, Ward *v.* Willson, 3 Mich. 1. Where a vessel was attached at the instance of a creditor, and notice to creditors to produce their claims published three months, and before any order of sale, the owner of the vessel procured her discharge by giving the bond provided by statute, it was held that creditors, who failed to file their demands with the proper officer within three months after the first publication of notice, lost the benefit of the lien given them by statute. Watkins *v.* Atkinson, 2 Mich. 151.

[2] Indiana Stat. 1838. Under this statute it has been held, that, where there are several liens on a boat, and the boat is sold on a judgment in a suit under the statute for one of the claims, the purchaser takes the boat discharged of the rest. Steamboat Rover *v.* Stiles, 5 Blackf. 483. See also Southwick *v.* Packet Boat Clyde, 6 Blackf. 148.

[3] Rev. Stat. 1845, p. 71, ed. 1856, p. 107. It has been held, that, to enable the owner or consignee of a vessel to take an appeal from the judgment of a justice of the peace, he must make himself a party defendant to the suit before the justice. Sch. Constitution *v.* Woodworth, 1 Scam. 511. The master cannot proceed against the vessel *in rem* for his wages. Chauncey *v.* Jackson, 4 Gilman, 435. And in Germain *v.* Steam Tug Indiana, 11 Ill. 535, it was decided that the lien attaches the moment the liability is incurred, but it cannot be asserted to the prejudice of creditors or purchasers, unless the remedy be pursued within three months; but a party is not bound to enforce his lien till that period has elapsed, and when once acquired it remains in force, unaffected by any proceeding to enforce subsequent liens. And the sale of a vessel under a judgment on an attachment obtained by a seaman or material man does not divest any liens of a superior degree, nor any antecedent liens of the same degree. An attachment will not lie for towing a canal boat. Merriman *v.* Canal Boat Col. Butts, 15 Ill. 585.

[4] Missouri R. C. 1845. The action must be commenced within six months after the action has accrued, and in the county where the boat may be found at the time. If the boat does not come within the jurisdiction till after that time, the lien will be gone.

[5] Acts of 1840, 1841, Hutch. Dig. 288, art. 6; id. 290, art. 8. See Steamboat General Worth *v.* Hopkins, 30 Miss. 703.

[6] Rev. Stat. 101; Code, ch. 120. See Steamboat Kentucky *v.* Brooks, 1 Greene, 398; Ham *v.* Steamboat Hamburg, 2 Clarke, 460; West *v.* Barge Lady Franklin, 2 Clarke, 522.

consin,[1] California.[2] But in these States, it seems that actions

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Williamson *v.* Steamboat Missouri, 17 Mo. 374. Process cannot issue until a bond is filed. Steamboat Archer *v.* Goldstein, 13 Mo. 24. The attachment is dissolved by giving a bond, and after this the court cannot order the boat to be sold. St. Louis Perpet. Ins. Co. *v.* Ford, 11 Mo. 295. On an open running account, the lien continues for six months from date of last item. Carson *v.* Steamboat Daniel Hillman, 16 Mo. 256. But where the articles are furnished under a special contract, and delivered on different days, the lien attaches upon the delivery of the first. In computing the time within which the suit should be commenced, the day on which the delivery is completed should be excluded. Steamboat Mary Blane *v.* Beehler, 12 Mo. 477. It is provided by statute, that when a constable attaches goods or property he shall take possession, if they are accessible, and if not, he shall declare to the party in possession that he attaches the same in his hands, and summon such person as garnishee. It has been held, that the return of a constable on a warrant against a steamboat that he executed it by going on board the boat, and by reading the same to the clerk, finding the sheriff in charge, is sufficient to give the justice issuing the warrant jurisdiction to hear and determine the case against the boat. Steamboat Eureka *v.* Noel, 14 Mo. 513; Parkinson *v.* Steamboat Robert Fulton, 15 Mo. 258. A boat cannot be sold under an execution issued by a justice of the peace. Markham *v.* Dozier, 12 Mo. 288. In a suit against a boat before a justice, a judgment by default against the boat being rendered, and a motion to set aside the same being overruled, an appeal will lie. Hore *v.* Steamboat Belle of Attakapas, 11 Mo. 107. One of several part-owners can sue, under the statute, in the name of the boat. Steamboat Beardstown *v.* Goodrich, 16 Mo. 153. But he must give notice to all the others of his intention to sue, twenty days before the commencement of the action. Langstaff *v.* Rock, 13 Mo. 579. Whether a part-owner be mortgagee, or his right be absolute, he cannot acquire a lien on the boat for services rendered while he was owner. Nor can he sue the other part-owners without giving them the notice required by law, and he must show affirmatively that he gave them such notice. Steamboat Raritan *v.* McCloy, 10 Mo. 534. The St. Louis Court of Common Pleas has jurisdiction of actions of trespass against boats. Holloway *v.* Steamboat Western Belle, 11 Mo. 147. Under the statute an interpleader cannot be entertained. Garrison *v.* McAllister, 13 Mo. 579. The statute provides that the demand must be for services rendered *on board the boat.* It is sufficient if the demand be for services rendered as fireman, Jones *v.* Steamboat Morrisett, 21 Mo. 142, or as deck-hand, Williams *v.* Steamboat Morrisett, 21 Mo. 144. An action will lie against the boat by name for the non-performance of a contract made by her master, upon a trip up the river, for the transportation of freight upon the return trip. Taylor *v.* Steamboat Robert Campbell, 20 Mo. 254. A boat is not responsible for a breach of a contract of affreightment made by a person in possession as trespasser. Steamboat Madison *v.* Wells, 14 Mo. 360; Bates *v.* Steamboat Madison, 18 Mo. 99. But persons furnishing supplies are not bound to inquire whether the master or agent who has the actual possession of a vessel is legally entitled to such possession, in order to secure a lien. Steamboat Lehigh *v.* Knox, 12 Mo. 508. There is no lien upon a steamboat for the use of a private wharf boat. Bersie *v.* The Steamboat Shenan-

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[1] Wisconsin, Rev. Stat. 116. See Rand *v.* The Barge, 4 Chand. 68.

[2] Laws of California, First Sess. p. 189, ch. 75, § 2; Compiled Laws of 1853, p. 576, ch. 6, § 318.

of this sort will not be sustained under their statutes, if the cause of action arose out of the States.[1]

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doah, 21 Mo. 18. The statute divides debts into four classes. Each class is to be preferred according to its number, the highest number being the last class. But a judicial sale of a boat under the State law to satisfy a lien of one class, conveys to the purchaser a title free from the liens of every other class, superior or inferior. Steamboat Raritan *v.* Smith, 10 Mo. 527. So, of a sale under a similar law of another State. Finney *v.* Steamboat Fayette, 10 Mo. 612. But a sale in another State, which has no such law, does not divest the lien. Steamboat Sea-Bird *v.* Beehler, 12 Mo. 569. An action does not lie against a boat for damages sustained by a deck hand in being forced on shore by the master in breach of the contract of hiring. Blass *v.* Steamboat Robert Campbell, 16 Mo. 266. If the affidavit to a complaint against a boat is made by the plaintiff's agent, it must show his means of knowing the truth of the particulars specified in the complaint. Bridgeford *v.* Steamboat Elk, 6 Mo. 356; Hamilton *v.* Steamboat Ironton, 19 Mo. 523. And it must appear from the demand filed that the claim gives a lien. Luft *v.* Steamboat Envoy, 19 Mo. 476. The return of the officer to the writ must state that he seized the boat, but it need not state that he retains it in his custody. Blaisdell *v.* Steamboat Wm. Pope, 19 Mo. 157. Where a boat is seized and a bond given under the 9th section of the act, the lien is discharged, and the party cannot, after the boat has been sold, present his demand for allowance against the proceeds. Auvray *v.* Steamboat Pawnee, 19 Mo. 537. Unless the boat is bonded within five days after seizure, it is the duty of the officer to apply for an order of sale, and he has no authority to hold her without bond, subject to final process in the suit. Blaisdell *v.* Steam Ferry Boat Wm. Pope, 19 Mo. 538. For other decisions under the statute, based upon general rules, see Ready *v.* Steamboat Highland Mary, 17 Mo. 461, 20 Mo. 264; Whitmore *v.* Steamboat Caroline, 20 Mo. 513; Chouteau *v.* Steamboat St. Anthony, 16 Mo. 216, 20 Mo. 519; Dean *v.* Ritter, 18 Mo. 182; Porter *v.* Steamboat New England, 17 Mo. 290; Darby *v.* Steamboat Inda, 9 Mo. 645; Barge Resort *v.* Brooke, 10 Mo. 531; Jarbee *v.* Steamboat Daniel Hillman, 19 Mo. 141; Renshaw *v.* Steamboat Pawnee, 19 Mo. 532; Ritter *v.* Steamboat Jamestown, 23 Mo. 348.

[1] Ohio — Steamboat Champion *v.* Jantzen, 16 Ohio, 91; Goodsill *v.* Brig St. Louis, 16 Ohio, 178; Missouri — Steamboat Raritan *v.* Pollard, 10 Mo. 583; Steamboat Time *v.* Parmlee, 10 Mo. 586; Noble *v.* Steamboat St. Anthony, 12 Mo. 261; Twitchell *v.* Steamboat Missouri, 12 Mo. 412; Fisk *v.* Steamboat Forest City, 18 Mo. 587; James *v.* Steamboat Pawnee, 19 Mo. 517. In Swearington *v.* Steamboat Lynx, 13 Mo. 519, it was held that the Mississippi River, from the northern to the southern boundary of the State of Missouri, is one of the waters of the State referred to in the statute, and that the Missouri courts have jurisdiction over a tort committed on the river, though it be on the Illinois side. In Illinois, the statute has no extraterritorial jurisdiction. Frink *v.* King, 3 Scam. 144. So in Michigan. Bidwell *v.* Whitaker, 1 Mich. 469; Turner *v.* Lewis, 2 Mich. 350. And in Iowa, Steamboat Kentucky *v.* Brooks, 1 Greene, 398. The law is the same in Kentucky. Strother *v.* Lovejoy, 8 B. Mon. 135. In Ohio, in 1848, a supplementary act was passed, declaring that a wrong construction had been placed upon the statute by the court, and declaring that the courts should have jurisdiction in suits then pending as well as in future suits, notwithstanding the boat was out of the jurisdiction of the State at the time the tort was committed or the supplies furnished. The court, however, in a subsequent case, held that this act, so far as it provided for cases then pending, was unconstitutional and void,

It should be added, as a general remark, that part-owners of a ship are bound to deal fairly by each other, and that each, in the exercise of his own powers, must respect the rights of all the rest. This would flow from the principles of justice and morality; but it would seem that public policy comes in aid of these principles, in relation to a property, of which the proper use and management are so important to the public. Hence, in one interesting case, where some part-owners in a valuable ship sold their shares by an indenture between them and the purchaser, which contained covenants, that, in the opinion of the court, tended to control the appointment of persons to be employed in the management and navigation of the ship, it was held that such a contract violated the rights of the other owners, and also principles of public policy; and that the deed of transfer was therefore void.[1]

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because those cases arose under a statute, which it was the province of the court, and not of the legislature, to interpret. The Sch. Aurora Borealis *v.* Dobbie, 17 Ohio, 125. For a learned exposition of the various provisions and objects of the statutes of the different States upon this subject, see Merrick *v.* Avery, 14 Arkans. 370.

[1] Card *v.* Hope, 2 B. & C. 661.

CHAPTER V.

OF THE LIABILITIES OF OWNERS GENERALLY.

An owner of a ship, in possession of her, and having both the legal and equitable title, is liable for all supplies furnished and all repairs made to her, and all work and service rendered for her benefit, by order of the master, and in general, for all the contracts made by him for the benefit of the vessel; because, from the necessity of the case, the master is invested with a very wide authority to do and provide whatever is requisite for his ship. An owner who should resist any claim of this kind would probably be held to prove not only that the supplies or the work rendered was of no use or benefit to the ship or to him, but that it was so obviously useless that the furnisher could not have supposed the master authorized to obtain it.[1] Cases of this kind often occur; but those which depend upon the question, how far and when a *quasi* owner is liable in the same way as an actual owner, or in the stead of the actual owner, are more numerous and important.[2]

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[1] See ante, p. 87, note 1, and *post*, chapter on Powers and Duties of Master.

[2] Under what circumstances, and in what cases, the charterer will be considered to be the owner *pro hac vice*, we shall consider in our chapter on charter-parties. The question in every case is, whose agent is the party ordering repairs. If of the general owners, they are liable; but if not, the charterer alone can be looked to. Thus in Frazer *v.* Marsh, 13 East, 238, the repairs were ordered by the captain, who was also the charterer. It was held, that the general owner was not liable. *Le Blanc*, J., says: "An owner would have the appointment of the captain; but the defendant had no right to appoint the captain under the charter-party." And in Reeve *v.* Davis, 1 A. & E. 312, where a steam vessel was let by charter-party, the registered owners agreeing to keep the engine in order, but the charterer was to pay for all other repairs, it was held, that repairs ordered by the charterer, who was also the captain, except those necessary for the engines, could not be charged to the general owner, although the person making the repairs was unacquainted with the special agreement between the parties. Lord *Denman*, C. J., says: "The question is, Who were the contracting parties? The mere circumstance of ownership may be sufficient to create a liability where the vessel has been left under the control of a party who has given orders, if no intervening ownership has been created. But if a ship is let out to hire, I do not see how

Most of these questions occur in reference to mortgagees. It is quite certain that a mortgagee should take possession as soon as he reasonably can; and that, if he fails to do so, unless protected by the provisions of some statute in his behalf, he is liable to have his title defeated by any third party who acquires a right to the ship in ignorance of the mortgagee's prior title, and in good faith.[1] If a mortgagee takes possession, and especially if he takes out a new register in his own name, or if he does any acts which can be deemed in some degree equivalent to public notice that he is owner, this actual or apparently actual possession, added to his legal title as owner, seems to confer upon him the responsibilities and liabilities of an owner.[2] The principal diffi-

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the owners are liable for work done upon it by order of the party hiring, more than the landlord who lets a house." In this country, these decisions have been repeatedly followed. Perry *v.* Osborne, 5 Pick. 422; Urann *v.* Fletcher, 1 Gray, 125; Baker *v.* Huckins, Sup. Jud. Ct. Mass. 19 Law Reporter, 43; Thompson *v.* Snow, 4 Greenl. 264; Honston *v.* Darling, 16 Maine, 413; Webb *v.* Peirce, 1 Curtis, C. C. 104; Leonard *v.* Huntington, 15 Johns. 298. The same principle underlies numerous other decisions relative to contracts formed by charterers with third parties. See Reynolds *v.* Toppan, 15 Mass. 370; Taggard *v.* Loring, 16 Mass. 336; Cutler *v.* Winsor, 6 Pick. 335; Thompson *v.* Hamilton, 12 Pick. 425; Manter *v.* Holmes, 10 Met. 402; Cutler *v.* Thurlo, 20 Maine, 213; Williams *v.* Williams, 23 Maine, 17; Sproat *v.* Donnell, 26 Maine, 185. The vessel, however, is liable *in rem* for the breach of a contract of affreightment entered into by the master, provided such contract be within the scope of his authority. See *post*, p. 124, note 1.

[1] *Ex parte* Matthews, 2 Ves. Sen. 272; Atkinson *v.* Maling, 2 T. R. 462; Mair *v.* Glennie, 4 M. & S. 240; Hay *v.* Fairbairn, 2 B. & Ald. 193; Portland Bank *v.* Stubbs, 6 Mass. 422, 425; Tucker *v.* Buffington, 15 Mass. 477, 480; Badlam *v.* Tucker, 1 Pick. 389. See also cases *ante*, p. 79, note 1. In The Schooner Romp, Olcott's Adm. 196, it was held, that a person who took a mortgage of a vessel then in port, but suffered it to leave in the possession of the mortgagor, without any record on the ship's papers of the transaction, could not recover the vessel from a subsequent *bonâ fide* purchaser without notice, although he enforced his claim at the first opportunity after the vessel left, and there was an agreement between the mortgagor and mortgagee that the former should remain in possession until the mortgagee had a chance to enforce the mortgage. D'Wolf *v.* Harris, 4 Mason, 515, is doubted in this case, so far as it is an authority in opposition to the last point.

[2] Miln *v.* Spinola, 4 Hill (N. Y.) 177. See also, Hodgson *v.* Butts, 3 Cranch, 140. And so if he exercises other acts of ownership; as where his name appeared on the registry as owner, and he caused the place of his residence to be painted on the stern of the vessel. Tucker *v.* Buffington, 15 Mass. 477. But see Myers *v.* Willis, 17 C. B. 77, 33 Eng. L. & Eq. 204; affirmed, 18 C. B. 886, 36 Eng. L. & Eq. 350. And where the mortgagee has possession, and the voyage is performed for his benefit, he is liable for the wages of the master. Dean *v.* M'Ghie, 4 Bing. 45, 48, per *Burrough*, J.; Fisher *v.* Willing, 8 S. & R. 118, 122; Champlin *v.* Butler, 18 Johns. 169. But not where the master, with full knowledge of a secret agreement between the mortgagor and

culty occurs when the question arises, whether a mortgagor in possession is liable for supplies and repairs, or a mortgagee out of possession. For if a mortgagee chooses not to take possession, he may, at his own pleasure, incur the danger of having his title defeated by a third party, without any risk of impairing it as between himself and the mortgagor. And if he takes no possession, but is equally protected against all the world, either by record or by any statutory provisions, as if he had possession, this circumstance does not clothe him with all the liabilities which spring only from actual possession. And then the question occurs, Is he liable for supplies or work rendered to the vessel?

It is not unfrequently said, that this question is to be answered by ascertaining to whom the credit was given.[1] But this is certainly not so. The answer must be made by compounding three elements, and in their due proportion; one of them being this question of credit; another is, by whom was this credit authorized or justified; and there is still another, who has received and holds the benefit of the service rendered. It is a principle of very wide application, that, if any person accepts and holds the benefit of any service, he cannot deny that it was rendered to him, and for his benefit. This may seem to conflict with another principle, that no man can make himself the creditor of another against that other's will or without his consent. But they are reconciled by this rule, that if the benefit be ren-

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mortgagee that the latter should have no interest in the voyage, made a special agreement with the former in relation to his wages and privilege. Same case.

See also, the case of Martin *v.* Paxton, reported 1 Holt on Shipping, 353. *Abbott*, C. J., there held that the mortgagees of a ship who were the registered owners were not liable to a claim for wages by a sailor, though they accrued upon a voyage which was prosecuted for their benefit, the ship's freight and earnings during the voyage being made over to them by the same deed which conveyed the ship as a security for advances, on the ground that the plaintiff had made the contract on which he sued, with the mortgagor, who was master of the vessel and remained in possession, and had given credit to him and not to the defendants.

The mortgagee in possession is entitled to the freight accruing after possession taken. Dean *v.* M'Ghie, 4 Bing. 45; Kerswill *v.* Bishop, 2 Cromp. & J. 529; s. c. 2 Tyrw. 602.

The presumption is in favor of the mortgagee's right to take possession of the vessel. Holmes *v.* Sprowl, 31 Maine, 73. Hence the burden of proof will be upon him to show that he possessed no right of possession and control, if he rests a denial of responsibility on this ground.

[1] See *ante*, p. 91, note 1.

dered, then he who may receive it may also reject it; it is wholly at his choice whether to accept and hold it or not; and if he does choose to accept and hold it, then on all grounds, both of moral and legal justice, he puts himself in the same position as if he had originally requested this service. But this rule, again, has one important qualification; for it is not applicable at all, or if at all only in a modified form, where the party to be made debtor has no such choice, because the benefit done cannot be renounced or rejected without a positive loss and detriment. Does the conferring of it in that case, and the subsequent holding of it, create a legal claim against the holder? Perhaps the precise answer should be, that the holder, who retains a benefit because he cannot reject it, — as if repairs were made to a ship, of such a kind and extent that they could not be removed without dismantling her, — should pay for it, not the whole cost, but so much as it is certainly worth to him after deducting full compensation for all the damage and inconvenience of paying for it against his will. But the law cannot well apply such nice distinctions in practice; and the cases which hold an unconditional purchaser not in possession liable for supplies, although the furnisher had no knowledge that he was owner, or a mortgagee who has taken possession liable although the furnisher did not know of his title or possession, may rest, either upon the ground that he holds the benefit and must therefore admit his request for it, or that his ownership confers a constructive agency and authority on the person — usually the master — who ordered the supplies or repairs. But it cannot be said, with any accuracy, that in these cases credit is given to these *persons*, even if the charge in the furnisher's books is "to the Ship Henry and her owners." And it can never be true, that the owner or mortgagee in possession is liable for *repairs* put in *against* his will, although, being put in, he lets them remain.

The question, however, recurs, What is the liability of a mortgagee out of possession? And the general answer now is, undoubtedly, that he is not liable.[1] The question of credit will

[1] With respect to mortgages of ships the same difficulty seems to have existed as with respect to mortgages of lands. But while the equitable doctrines laid down by Lord *Mansfield* in the great case of Eaton *v.* Jaques, 2 Dougl. 455, with respect to the

always be decisive where the parties have made a bargain, and credit is given according to it, for there is nothing to prevent

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true nature of the interest of a mortgagee out of possession, were subsequently overruled in Great Britain, (see Williams *v.* Bosanquet, 1 Brod. & B. 238,) so far as they applied to real estate, they maintained their ground successfully in the case of ships. In this country, they were generally ratified to their full extent, almost from the first.

A doubt certainly has been expressed, *vide* Westerdell *v.* Dale, 7 T. R. 306, 312, per Lord *Kenyon*, C. J.; Tucker *v.* Buffington, 15 Mass. 477; but those cases in which the mortgagee was held liable as owner, *Ex parte* Machel, 1 Rose, 447; Starr *v.* Knox, 2 Conn. 215; Lord *v.* Ferguson, 9 N. H. 380; Henderson *v.* Mayhew, 2 Gill, 393, turn entirely on the rejection of the evidence offered to show the true nature of his title, whilst they recognize the truth of the general rule, which seems now well settled, namely, that where the mortgagee has neither taken possession nor exercised any other act of ownership over the vessel, he is not answerable for, nor entitled to, the benefit of the acts of the master or other agent of the ship. Thus, he is not liable for *supplies* and *repairs* furnished to her. Jackson *v.* Vernon, 1 H. Bl. 114; Twentyman *v.* Hart, 1 Stark. 366; Annett *v.* Carstairs, 3 Camp. 353; Baker *v.* Buckle, 7 J. B. Moore, 349; Briggs *v.* Wilkinson, 7 B. & C. 30; M'Intyre *v.* Scott, 8 Johns. 159; Ring *v.* Franklin, 2 Hall, 1; Birkbeck *v.* Tucker, 2 Hall, 121; Miln *v.* Spinola, 4 Hill (N. Y.) 177; Hesketh *v.* Stevens, 7 Barb. 488; Brooks *v.* Bondsey, 17 Pick. 441; Winslow *v.* Tarbox, 18 Maine, 132; Cutler *v.* Thurlo, 20 Maine, 213; Colson *v.* Bonzey, 6 Greenl. 474; Lord *v.* Ferguson, 9 N. H. 380; Philips *v.* Ledley, 1 Wash. C. C. 226; Duff *v.* Bayard, 4 Watts & S. 240; Cordray *v.* Mordecai, 2 Rich. 518.

And generally, he is not liable for the *contracts* or *negligence* of the mortgagor who is master. Thorn *v.* Hicks, 7 Cow. 697. Nor for the wages of the master and crew. Annett *v.* Carstairs, 3 Camp. 353; Fisher *v.* Willing, 8 S. & R. 118.

On the other hand, he is not entitled to the freight earned by the ship. Chinnery *v.* Blackburne, 1 H. Bl. 117, (n.); Brancker *v.* Molyneux, 3 Scott, N. R. 332. See also, *post*, ch. 7, § 8. In Myers *v.* Willis, 17 C. B. 77, 33 Eng. L. & Eq. 204, the ship was transferred by the owner to the defendant by an absolute bill of sale, and the transfer duly recorded. The vessel, at the time, was at sea. The transaction was not intended as a sale, but merely as a collateral security for a loan. Subsequently the master, in ignorance of what had passed, entered into a contract of affreightment with the plaintiff. This action was brought to recover damages for the breach of said contract. Held, that the plaintiff could not recover. *Jervis*, C. J., delivering the opinion of the court, said: "I am of opinion, that the defendant is entitled to judgment. It is admitted that the law is now different from what it was formerly, when it used to be considered that the register only was to be looked at, and that it alone was conclusive as to the ownership of the vessel, and conclusive, therefore, of the liability of the party appearing thereon as owner; but it is now settled that the question of liability in these cases is to be determined in the same way as in all other cases of contract, by ascertaining with whom the contract was made. That will depend, in this case, on the relation of principal and agent — whose agent was the master? It has been admitted, that, in the case of a mortgagee of a vessel who takes merely the security of the ship, not intending to incur liability as owner, a mere entry by him into possession does not render him liable for the contracts of the master, made after the execution of the mortgage and before entry, because that alone does not prove an intention on the part of

their making what bargain they will. A furnisher of supplies may agree with the master ordering them, even if there be an absolute owner in possession, to charge them only to the master and look to nobody else; and then he has no claim beyond the master. So a mortgagee out of possession, or indeed a stranger, may order the goods or service as for himself, or may agree to pay for them if supplied to the ship, and then he will be bound to pay for them without any reference to his interest in the ship.

And this bargain, or any other, may be proved by, or inferred from, circumstances. But, on the one hand, a mortgagee who does not have the possession and control of the ship does not authorize a furnisher to consider him the owner; and if credit be given him, it does not bind him unless given with his consent. On the other hand, so long as the mortgagor retains possession and control, the ship may be regarded as being only a security for a debt which is less than its value, the mortgagor not only owning the equity of redemption, but keeping possession of the vessel, that he may, by her earnings, enable himself to pay the debt, and, by adding to, or preserving her value, add to or preserve his own interest in her if he proposes to pay the debt without her, or in the excess of her value over the debt. And therefore the mortgagee cannot be made liable on the ground of accepting and holding the benefit rendered by the supplies or repairs.

It should be noticed here, — and will be more fully stated hereafter, — that "material-men" so called, that is, those who supply the materials for supplying and repairing a ship, and all who work upon her for such purposes, have, by the maritime law, a lien on the ship itself for the whole amount due them, excepting in the home port.[1] But this is usually enforceable

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the mortgagee to adopt the master as his agent." Affirmed in Exchequer Chamber, 18 C. B. 886, 36 Eng. L. & Eq. 350. See also Hackwood *v.* Lyall, 17 C. B. 124, 33 Eng. L. & Eq. 211.

[1] Ex parte Shank, 1 Atk. 234; Buxton *v.* Snee, 1 Ves. Sen. 154; Watkinson *v.* Bernadiston, 2 P. Wms. 367; Westerdell *v.* Dale, 7 T. R. 306; Rich *v.* Coe, Cowp. 636; Justin *v.* Ballam, 1 Salk. 34; The Calisto, Daveis, 29; s. c. Read *v.* The Hull of a New Brig, 1 Story, 244; Davis *v.* A New Brig, Gilpin, 473; The Brig Nestor, 1 Sumn. 73; Peyroux *v.* Howard, 7 Pet. 324; The St. Jago de Cuba, 9 Wheat. 409; The General Smith, 4 Wheat. 438; Buddington *v.* Stewart, 14 Conn. 404; Davis *v.*

only in admiralty, — although some recent State statutes seem to give a similar right and remedy in the State courts, — and we prefer considering the subject hereafter, when treating of admiralty process and jurisdiction.

Child, Daveis, 71; The Sch. Marion, 1 Story, 68; Leland *v.* The Ship Medora, 2 Woodb. & M. 92, 96.

CHAPTER VI.

OF HYPOTHECATION BY BOTTOMRY.

In some respects this is analogous to the mortgage of a ship, but in others it is wholly different. The questions which arise from the bottomry of a vessel are, in this country, frequently settled in admiralty, and some of them must be so; and it is to be regretted, perhaps, that the principles of admiralty law are not always, and in all courts, applied to these questions. These principles are, partly from usage and precedent and partly from statutory provision, as we shall hereafter state more fully, those of the civil law. Our common law mortgage, where the *property* must pass to the creditor, and it is a matter of indifference whether the *possession* remains with the debtor or accompanies the property, was, strictly speaking, unknown to the civil law. And it is quite common for our courts to speak of *pledging* a ship by *hypothecation*. But this is not accurate. It was of the essence of a *pledge* (pignus) of the civil law, that the possession of the thing pledged passed to the pledgee, and remained with him;[1] and this rule has lately been applied and recognized by courts of common law.[2] But in *hypothecation* the thing hypothecated might remain in the possession of the owner. The creditor might acquire neither the *property* nor the *possession* of it. Thus, he had no *jus in re*, but he had a *jus ad rem;* a right or interest in or to the thing hypothecated, a *privilegium*, or, as we call it, a lien, which could be enforced for the payment of his debt.[3]

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[1] Justinian, Inst. Lib. 4, tit. 6, § 7; Dig. Lib. 13, tit. 7, l. 35; Vinnius ad Inst. Lib. 4, tit. 6, § 7, p. 800; Domat's Civil Law, by Strahan, § 1657, Cushing's ed. vol. 1, p. 648; The Brig Nestor, 1 Sumner, 73, 81.

[2] Ryall *v.* Rolle, 1 Atk. 165; Reeves *v.* Capper, 5 Bing. N. C. 136; Homes *v.* Crane, 2 Pick. 607; Cortelyou *v.* Lansing, 2 Caines Cas. 200; Brownell *v.* Hawkins, 4 Barb. 491.

[3] The Tobago, 5 Rob. Adm. 218, 222; Johnson *v.* Shippen, 2 Ld. Raym. 982; The Young Mechanic, 2 Curtis, C. C. 404.

We consider that this rule has been expressly applied by the Supreme Court of the United States to hypothecation by bottomry.[1] In the case in which this was done, (in 1808,) the court intimate a doubt whether a bottomry bond, made by the owner in a home port, can be within the admiralty jurisdiction.[2] It has been repeatedly asserted, that every valid bottomry bond, wherever or however made, is wholly within that jurisdiction; but this is certain only of bottomry bonds made abroad, and perhaps should be limited to those which are made by the master to meet the necessities of the ship.[3] It would be very difficult for a court of common law, by any common law process, to enforce a lien by bottomry on a ship, in any other way than by considering that the contract of bottomry gave the creditor the property or possession, or both, of the ship, subject only to defeasance on payment of the debt; and then, permitting him to make it available for his security, in the same manner as if it were a pledge. But unless it were a mere pledge or mortgage of the ship, at home, there would be need of admiralty jurisdiction.

Money may be secured by a bottomry bond by the owner, in the home port, and not unfrequently is so in this country.[4] But

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[1] Blaine *v.* The Charles Carter, 4 Cranch, 328. See also, United States *v.* Delaware Ins. Co. 4 Wash. C. C. 418.

[2] The same is also stated by Abbott, p. 153. But this opinion of the learned author is founded entirely on a dictum of *Holt*, C. J., in Johnson *v.* Shippen, 2 Ld. Raym. 982. There is also a dictum of *Lawrence*, J., in the case of Busk *v.* Fearon, B. R., Mich. T., 44 Geo. 3. The case is reported in 4 East, 319, but the dictum is not noticed.

[3] In this country, this question has been much discussed. Besides the intimation of the court in Blaine *v.* The Charles Carter, *supra*, the following cases support the view, that there is no jurisdiction in admiralty if the vessel is hypothecated by the *owner* in the home port. Forbes *v.* Brig Hannah, Hopk. 99, Bee, 348; Knight *v.* The Attila, Crabbe, 326, and affirmed in circuit court, but not reported; Hurry *v.* Ship John & Alice, 1 Wash. C. C. 293; Hurry *v.* Assignees of Hurry, 2 Wash. C. C. 145. On the other hand, the jurisdiction has been sustained by Mr. Justice *Winchester* in Wilmer *v.* The Smilax, 2 Pet. Adm. 295, n.; by Mr. Justice *Thompson*, in the case of The Sloop Mary, 1 Paine, C. C. 671; and by Mr. Justice *Story*, in an elaborate judgment in the case of The Brig Draco, 2 Sumner, 157. See also, Selden *v.* Hendrickson, 1 Brock. C. C. 396. The jurisdiction was also maintained by the court of admiralty in Ireland, Corish *v.* The Murphy, 2 Browne, Civ. & Adm. Law, Appen. 530.

[4] See cases *supra*, also Thorndike *v.* Stone, 11 Pick. 183; Greeley *v.* Waterhouse, 19 Maine, 9. So of a respondentia bond. Conard *v.* The Atlantic Ins. Co. 1 Pet. 386.

originally, and, as we think, more properly, this bond was seldom made, excepting by a master in a foreign port, where money, which was necessary, could not be raised otherwise. And it will be more convenient to defer what more we have to say on this topic until we treat of the powers and duties of the master.

It may be added, that the statute of 1850,[1] which requires that mortgages of ships shall be registered at the custom-house, expressly provides that the lien by bottomry created on any vessel during her voyage by a loan of money or materials, necessary to enable such vessel to prosecute a voyage, shall not lose its priority, or be affected by the provisions of the act. And it has been decided that bottomry bonds are not within the purview of a State statute requiring record of mortgages of personal property.[2]

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[1] Chapter 27, 9 U. S. Stats. at Large, 440.

[2] The Brig Draco, 2 Sumner, 157, 189; Fontaine *v.* Beers, 19 Ala. 722.

CHAPTER VII.

OF THE USE OF THE SHIP BY THE OWNER.

SECTION I.

OF THE CARRIAGE OF GOODS ON FREIGHT.

A SHIP, as the great instrument of commerce, may be regarded as of great importance, not only to its immediate owner, but to the community; and the public policy or general expediency of promoting and assisting the profitable use and employment of the ship, in the commercial interchange of commodities between distant nations, has a considerable effect upon the law of shipping. It is probable that the system of liens hereafter spoken of, and many of the duties and rights of the owner and master of the ship, on the one hand, and of the shippers of goods on the other, if they do not arise from this policy, are nevertheless affected by it, and owe to it whatever modifications cause them to differ from what they would be under the ordinary rules of the law of contracts.

The owner sometimes uses his own ship, and sometimes lets it out to others, who use it. We will begin by considering the use he makes of it himself.

He may carry his own merchandise, or that of others, or both. The word "freight" has several meanings. Beawes defines it as "the sum agreed on for hire of a ship, entirely or in part, for the carriage of goods."[1] This is now the usual meaning of this word in law. In common conversation, however, it often means also the goods carried. And that this was, if not its original meaning, one of its early meanings, is certain from the

[1] Beawes, Lex Mercatoria, 118.

case of Bright *v.* Cowper (1620),[1] the report of which begins, "Action of covenant brought upon a covenant made by the merchant with a master of a ship, that, if he would bring *his freight* to such a port, he would pay him such a sum." Now, however, it means the sum to be paid for such carriage, and also the sum which might be payable therefor.[2] For, if a ship-owner carries his own goods only, he may insure his freight *eo nomine*, meaning what another would have paid him for carriage of the same goods on the same voyage, or include it in a valuation of his ship or of his cargo.[3]

It may be remarked in the outset, because the principle lies at the basis of the law of freight, that the ship and the cargo have reciprocal rights against each other, and reciprocal liens to enforce the rights of each against the other. The ship-owner undertakes and promises to carry in his ship the goods of the shipper to their destined port in safety, by the proper route, and in due season. This implies a promise that his ship is sea-worthy in all respects, that it has a sufficient master and crew, who will take due care of the goods as to lading them on board, carrying and delivering them, and who will navigate the ship to her destined port in the usual way, without unnecessary delay or deviation.[4] And if there be a failure in any of these particulars, and

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[1] 1 Brownl. & G. 21.

[2] In Robinson *v.* Manufacturers' Ins. Co. 1 Met. 143, 145, *Shaw*, C. J., said: "The term freight is somewhat equivocal, and has several meanings. It is sometimes used to describe the compensation for the carriage of goods, sometimes for the hire of a vessel, and sometimes it is used in a loose sense to signify the goods or property carried. It is never, however, used in the latter sense, when intended to describe a separate subject of insurance; but is then used in contradistinction to ship and cargo, to designate the compensation to be paid to the ship-owner for the use of his vessel, either for the carriage of merchandise, or for the hire of the vessel, in whole or in part." See also, Adams *v.* Penn. Ins. Co. 1 Rawle, 97, 106.

[3] Flint *v.* Flemying, 1 B. & Ad. 45; Wolcott *v.* Eagle Ins. Co. 4 Pick. 429; Clark *v.* Ocean Ins. Co. 16 Pick. 289. So, under the statute of 1851, c. 43, § 3, limiting the liability of ship-owners to the value of the ship and freight, it has been held that the term "freight" includes the earnings of the vessel in transporting the goods of her owners. Allen *v.* Mackay, 16 Law Reporter, 686.

[4] What amounts to a deviation, and what circumstances will excuse it, we shall treat of in our chapters on Insurance. We speak of it here only so far as it bears upon the relation existing between the owner of the ship and the freighter. It is well settled, that, if the vessel deviates, and the cargo is insured, the risk terminates, and the underwriters are exonerated. It follows, as a necessary consequence, that the ship-owner having put an end to the contract existing between the freighter and the underwriter,

the goods are thereby injured or lessened in their value to their owner, the ship-owner is responsible, and the ship itself is

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should stand in the place of the latter, and assume his risks. But a question has arisen, whether the freighter is bound to show not only that the vessel deviated and the goods were subsequently lost or damaged, but also that the loss occurred in consequence of the deviation. In Souter *v.* Baymore, 7 Barr, 415, a contract was entered into for the exclusive use of the ship for a specified voyage. The master, however, put into an intermediate port, and took a deck load of wood. After the vessel sailed from this port, she encountered a storm, and the cargo was damaged. The master brought an action for his freight in one of the State courts of Pennsylvania, and the damage done to the goods was set up in defence. It was contended, that, as the master deviated unnecessarily, he was liable for any subsequent loss during the voyage; and that, as the contract was for the exclusive use of the vessel, the taking of the deck load made the owner responsible as an insurer, but the court held that he was only liable for the damage occasioned by the deviation or breach of the contract, and that he was entitled to his freight without any deduction. Although we think it clear that the owner was entitled to the freight, if the consignee accepted the goods, yet a deduction should have been made for the damage done to the cargo. After the suit was commenced in the State court, but before trial, the shipper brought an action in the District Court of the United States against the ship to recover for the damage done to the cargo. Knox *v.* The Ninetta, Crabbe, 534. And it was held, that, by the deviation, the captain became an insurer, and the ship was liable for any subsequent loss. This we consider to be the well settled rule of law. Davis *v.* Garrett, 6 Bing. 716; Freeman *v.* Taylor, 8 Bing. 124; Parker *v.* James, 4 Camp. 112; Hand *v.* Baynes, 4 Whart. 204; Crosby *v.* Fitch, 12 Conn. 410; Bond *v.* The Cora, 2 Pet. Adm. 373, 379, 2 Wash. C. C. 80; Walsh *v.* Homer, 10 Mo. 6.

In M'Andrew *v.* Adams, 1 Bing. N. C. 29, a charter-party was entered into on the 20th of October, by which the owner of the ship agreed to go in ballast from Portsmouth to St. Michael's, and bring back a cargo of fruit direct to London. The charterer was to be allowed thirty-five running days for loading and unloading, to commence on the first of the next December, and if the vessel did not arrive at St. M.'s by the 31st of January of the next year, the charterer was to be at liberty to rescind the charter-party. It was held that the ship-owner was bound to send the ship at once to St. Michael's, and was not at liberty to make an intermediate voyage for his own purposes, notwithstanding he arrived there before the 31st of January. In Nichols *v.* Tremlett, U. S. Dist. Ct. Mass., Boston Courier, June 22, 1857, the charter-party represented the vessel to be lying in the harbor of Boston. It appeared by the evidence that she was in point of fact at Searsport in Maine undergoing repairs, and was detained for that purpose some days. The action was brought for demurrage at the port of loading, and it was contended that none was due, because this deviation having taken place, it was said to be impossible to ascertain whether there would have been any, or if any, how much, detention beyond the rightful lay-days, if the libellant had used due diligence and arrived at the proper time. But the evidence on this point being very full, the court were of opinion, that, if the vessel had sailed immediately, she would have arrived at the port of loading on a certain day, and at that time, as there was not a full supply of the merchandise which she was to carry ready for shipment, a delay of a certain number of days would have happened, and for that the respondent was liable. An intention to deviate is not sufficient. Hobart *v.* Norton, 8 Pick. 159. Usage to deviate may be shown. Lowry *v.* Russell, 8 Pick. 360; Thatcher *v.* McCulloh, Olcott, Adm.

subjected to the lien of the shipper of the goods, in order that he may enforce his rights, or obtain indemnity for a violation of them.[1] On the other hand, if the goods are so carried, the

365. If the shipper receive the goods, he is bound to pay freight, but may offset the damage. Knox *v.* The Ninetta, *supra;* Thatcher *v.* McCulloh, *supra.* In Dunseth *v.* Wade, 2 Scam. 285, 289, it is said, that: "If a common carrier attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his behalf in the contract." This applies where goods are carried on deck without the knowledge of the shipper. See *post,* ch. 7, § 5, n. So if goods are to be sent by a specified ship, and they are sent by another, this is a breach of the contract, and makes the ship-owners liable as insurers. Bazin *v.* Richardson, U. S. C. C. Penn. 20 Law Reporter, 129. See also, as to the effect of a deviation on the contract of bottomry, *post,* ch. 11, § 4, n., and on the contract of seamen, *post,* ch. 12, § 8, n.

[1] Cleirac, Us et Coustumes de la Mer, 72. *Abbott,* in his treatise on Shipping, 127, is of the opinion that in England the court of admiralty has no jurisdiction to enforce the lien against the ship in such a case. See also, Birley *v.* Gladstone, 3 M. & S. 205; Gladstone *v.* Birley, 2 Meriv. 401; Pierson *v.* Robinson, 3 Swanst. 139, n. In this country, the existence of the lien is not only fully recognized, but it can be enforced by process *in rem* in admiralty. The Gold Hunter, 1 Bl. & Howl. Adm. 300; The Boston, id. 309; The Grafton, Olcott, Adm. 43, 1 Blatchf. C. C. 173; The Rebecca Ware, 188; The Waldo, Davcis, 161; The Brig Casco, id. 184; The Sch. Volunteer, 1 Sumner, 551; Clark *v.* Barnwell, 12 How. 272; Rich *v.* Lambert, id. 347. And every contract of the master, entered into within the usual scope of his authority, binds the vessel to the fulfilment of it. The Paragon, Ware, 322; The Phebe, id. 263; Hewett *v.* Buck, 17 Maine, 147. In the case of The Druid, 1 Wm. Rob. 391, 399, Dr. *Lushington* used the following language in reference to a lien on the ship: "In all causes of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship, and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and *vice versâ,* no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." See also, The Bold Buccleugh, 3 Wm. Rob. 220, 231, 2 Eng. L. & Eq. 536, 540. We have seen that if the charterers have the entire control of the vessel, and the master is their agent, the general owners are not personally liable for a breach of a contract entered into by the master with a third party. The question then arises, Is there any remedy against the vessel, or is it confined to the personal liability of the charterers? The language used by Dr. *Lushington,* above, must be confined to the case then before him, and is not susceptible of a general application. In The Druid, the action was *in rem* against a vessel for damages caused by a collision, occasioned by the wilful tort of the captain. The court held, that, as the owners would not be personally liable in such a case, the vessel was not. It is now settled, that a vessel is liable *in rem* for a breach of a contract made by a master within the scope of his employment, although he be appointed by the charterer. The Phebe, Ware, 263; The William and Emmeline, 1 Bl. & Howl. Adm. 70, 71; Sch. Freeman *v.* Buckingham, 18 How. 182; Thomas *v.* Osborn, 19 How. 22. And in Jackson *v.* The Julia Smith, 1 Newb. Adm. 61, 6 McLean, C. C. 484, it was held, that, where the pos-

owner of the goods is bound to pay to the owner of the ship the freight earned by the carriage, and the ship-owner has a lien on the goods to enforce his rights against them.[1] And if the

session of the vessel is not tortious, but under color of right, a contract of affreightment made with the master would bind the vessel. But for acts not within the scope of his employment, the owners are not personally liable, nor is the ship. See *post*, p. 135, n. 1.

[1] That the ship-owner, and the master, as his agent, have a *lien* on the goods carried in their ship for the freight, is a proposition which appears never to have been disputed. Molloy, Lib. 2, c. 4, § 12; Beawes, Lex Mercatoria, Tit. Freight, 118; Jacobsen, Sea Laws, 261; Anonymous, 12 Mod. 447; id. 511; Artaza *v.* Smallpiece, 1 Esp. 23; Sodergreen *v.* Flight, cited 6 East, 622; Wilson *v.* Kymer, 1 M. & S. 157; Mitchell *v.* Scaife, 4 Camp. 298; Hutton *v.* Bragg, 2 Marsh. 339, 345, 7 Taunt. 14, per *Gibbs*, C. J.; Faith *v.* East India Co. 4 B. & Ald. 630; Christie *v.* Lewis, 2 Brod. & B. 410, 5 Moore, 211; Lucas *v.* Nockells, 4 Bing. 729; Campion *v.* Colvin, 3 Bing. N. C. 17, 3 Scott, 338; Lane *v.* Penniman, 4 Mass. 91; Lewis *v.* Hancock, 11 Mass. 72; Cowing *v.* Snow, 11 Mass. 415; Pickman *v.* Woods, 6 Pick. 248; Clarkson *v.* Edes, 4 Cow. 470; Chandler *v.* Belden, 18 Johns. 157; Van Bokkelin *v.* Ingersoll, 5 Wend. 315; Lander *v.* Clark, 1 Hall, 355, 374; Holmes *v.* Pavenstedt, 5 Sandf. 97; Jordan *v.* James, 5 Ohio, 88; Fernandez *v.* Silva, 1 La. 269; Palmer *v.* Gracie, 4 Wash. C. C. 110; Gracie *v.* Palmer, 8 Wheat. 605; Ruggles *v.* Bucknor, 1 Paine, C. C. 358; Drinkwater *v.* The Brig Spartan, Ware, 149; The Sch. Volunteer, 1 Sumner, 551, 569; Certain Logs of Mahogany, 2 Sumner, 589, 601; Perkins *v.* Hill, 2 Woodb. & M. 158. But respecting the true character and origin of this lien, the same unanimity by no means exists. On the one hand, it is supposed by Mr. Justice *Ware* to exist by the custom of merchants, and to be derived from the rule of the maritime law. "The general right of the master and owner to retain the merchandise for the freight due upon it," he says, "has not been denied. It is too well established to admit of doubt. It is a principle of the general maritime law, the common law of the commercial world, sanctioned by all the maritime codes, ancient and modern, and confirmed by numerous decisions of the highest courts, both in this country and England. Nor does there appear to be any difference in principle, nor is any recognized in law, whether the merchant takes the whole vessel by a charter-party, or sends his goods in a general ship. The lien of the owners is as perfect for the hire of the vessel stipulated in the charter-party, as it is for the freight stipulated in the bill of lading. In both cases the claim is privileged in the same degree and to the same extent." Drinkwater *v.* The Brig Spartan, Ware, 149, 155.

The rule of the maritime law, here alluded to, is thus given by Cleirac: "Le batel est obligé à la marchandise, et la marchandise au batel." See Cleirac on the 21st Art. of the Jugemens d'Oleron. Roccus declares, in his treatise "De Navibus et Naulo," Not. 87, "Naulum solvi debet via exequutiva, ex mercibus conductis, vel a domino ipsarum," (upon the accomplishment of the voyage, the freight is to be paid out of the merchandise carried, or by the owner of the same,) and further on in Not. 88: "Naulum conventum solvendum est infra dies octo, decurrendos a die quo navis pervenerit ad portum destinatum pro exoneratione mercium et magister navis non potest compelli ad consignationem mercium, quousque naulum sibi non solvatur; imo antequam exonerentur merces, naulum est solvendum; nisi aliter convenerit dominus mercium cum navis magistro." (The freight agreed upon is to be paid within the eight days following the day upon which the ship reached the port designed

goods are once laden on board, the ship-owner has a completed right to carry them the whole distance; nor can the shipper re-

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for the discharge of the goods, and the master cannot be compelled to deliver over the goods in so far as the freight is not paid to him; indeed the freight is to be paid before the goods are discharged, unless the owner has otherwise agreed with the master.)

The Ordonnance de la Marine, Lib. 3, Tit. 1, Art. 11, declared, that, "Le navire, ses agrès et apparaux, le fret et les marchandises chargées, seront respectivement affectés aux conventions de la charte-partie." (The ship, rigging, etc., the freight and the goods laden shall be respectively bound to the conditions of the charter-party.) On which Valin remarks: "The privilege granted by this article is to be understood respectively and distributively, that is to say, that the goods of the shipper are specially liable to the payment of the freight," "nam et ipsum naulum potentius est," says the Law, 6, § 1, "qui potiores in pignore." According to the same author, this privilege did not empower the master to detain the goods on board if the freight was not paid, but when they had been discharged, he might prevent their transportation or take possession of them in the lighters or the storehouse, or even after they had reached the consignee, provided he did so within fifteen days, and before their transfer to a third party. The provision of the ordinance has been modified by the Code de Commerce, Art. 306, under which the master is entitled to cause the goods to be deposited in a warehouse, while the freight is paid, subject to the same conditions as before.

From the language of the earlier English writers on commercial law, it certainly appears as if they considered the rule of the English law to be derived from these sources. Molloy says, De Jure Maritimo, Lib. 2, ch. 4, § 12, "The lading of the ship in construction of the law is *tacitly* obliged for the freight, the same being in point of payment preferred before any other debts to which the goods so laden are liable, though such debts as to time were precedent to the freight, for the goods remain, as it were, *bailed* for the same."

So Beawes, in his Lex Mercatoria, 118, remarks: "Freight must be paid in preference to all other debts for whose payment the goods stand engaged, but as those are responsible to the ship for her hire, so is the ship to the owner of the goods," etc. And Abbott, p. 284–286, seems to incline towards this view, although he speaks vaguely of the liens depending in cases where it is not created by special contract, *on some general principle*, without specifying what principle. Indeed, the origin of the lien in question does not appear to have been ever discussed by the English courts. See also, Chandler *v.* Belden, 18 Johns. 157, 162, per *Spencer*, C. J. "The right to retain the cargo for the freight has grown out of the usage of trade."

But it is to be remarked, that, although derived from the maritime law, the lien, as known to the courts of Great Britain and America, is clearly not a maritime lien, properly speaking. It is not a "privilegium," a privileged claim upon the goods, following them wherever they go, like the reciprocal lien which binds the ship by the maritime law to answer for the destruction of the goods. It is not so considered, we have seen, by the continental writers, who speak merely of the master's right to retain the goods for his freight, whilst the Ordonnance de la Marine merely allows him to resume the possession against the original consignee, and within fifteen days; and Chancellor Walworth expressly distinguishes it therefrom. "The right of the master to retain the freight money, after it has come into his possession, for a general balance against the owner, and his lien upon the cargo to compel payment of the freight, as the agent and acting in behalf of the owner, are frequently mentioned in the reports, and are sometimes confounded with the lien or claim of the master on the freight, as against

claim them and take them out of the ship, (unless by his consent,) without paying to the owner either his full freight, or compensa-

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the owner, before it has been actually received from the shipper. *The two first are in the nature of common law liens; and if the master part with the money in the one case, or the possession of the goods in the other, the lien is gone;* but the lien on the freight, as such, by the maritime law, which is now under discussion, is incidental to, or a consequence of the lien upon the ship ; and it may be enforced in the same manner, by a proceeding *in rem* in the admiralty courts. It is not strictly a lien, or mere right to retain possession of the subject until payment of the debt charged thereon, but it is the *privilege* of the civil law, or an equitable lien which may be enforced, although the claimant never was in the actual possession of the subject, out of the proceeds of which satisfaction is sought." Van Bokkelin *v.* Ingersoll, 5 Wend. 315, 325.

This opinion of the learned chancellor is in strict accordance with the vast majority of the cases, from the early anonymous one in 12 Mod. 511, down to the present day.

It may be this common law character of the ship-owner's lien on the goods for his freight, the fact that it appears to consist in a mere right to detain them, as a security for payment, which has induced the courts and text-writers in some instances to make the same depend not on the maritime, but on the policy of the common law. This has been usually done by identifying it with the lien of the common carrier, from which it would result that the lien must be confined to such ship-owners as fall within the denomination of common carriers, whereas Lord *Holt* expressly stated, in an early case, Anonymous, 12 Mod. 447, that every master of a ship was entitled to it, (in the absence of any agreement to the contrary). It is true that ship-owners and masters engaged in carrying the goods of others for them are usually styled common carriers by the courts, without distinction, a proposition which, although constantly reiterated, we shall hereafter have occasion to contest. See Whitaker on Liens, 95; Cross on Liens, 287 ; Pinney *v.* Wells, 10 Conn. 104 ; Gracie *v.* Palmer, 8 Wheat. 605, 632.

It is a little singular that in this last case Mr. Justice *Johnson*, in another part of his decision, gives a somewhat different definition of this lien ; he says, p. 635 : " On what principles rests the general lien of the ship on the goods for freight ? The master is the agent of the ship-owner to receive and transport ; the goods are improved in value by the cost and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and ship-owner, and the law will not suffer that possession to be violated until the laborer has received his hire."

This appears to us a ground, on which to rest the ship-owner's lien, entirely distinct from his character as a common carrier. The principle here advocated applies as forcibly to the case of a private carrier as a common carrier, and is indeed the application to the case of carriers of another species of lien, that which every bailee who, by his labor and skill, has conferred value upon a specific chattel bailed to him, possesses on it, for his stipulated reward. See M'Intyre *v.* Carver, 2 Watts & S. 392 ; Forth *v.* Simpson, 13 Q. B. 680; Morgan *v.* Congdon, 4 Comst. 551.

It has been said that by parting with the possession of the goods the owner loses his lien, but this is not the case where his delivery of them is procured by fraud, for such a delivery is void in the sight of the law. Bigelow *v.* Heaton, 6 Hill (N. Y.) 43. But he is free to waive his lien and resort to his personal remedy against the owner of the goods, if he thinks proper. Shatzell *v.* Hart, 2 A. K. Marsh. 191. And it was held in a Louisiana case, that a master who refused to deliver the goods on other grounds than the non-payment of the freight, thereby lost his right to avail himself of the want of tender. Fernandez *v.* Silva, 1 La. 269, 274. It has been decided in England, that the

tion for any trouble or loss sustained by him. How far the obligation of the shipper extends seems however not to be settled by the authorities.[1]

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ship-owner has no lien for dead freight on goods carried; that is, for the freight which is due for the unoccupied portion of the ship. Birley *v.* Gladstone, 3 M. & S. 205; Phillips *v.* Rodie, 15 East, 547.

[1] It is said in Curling *v.* Long, 1 B. & P. 634, that, before the ship breaks ground, the ship-owner has no lien for freight; but notwithstanding this case, it is now well settled, that, as soon as he has them on board, and perhaps as soon as he has taken charge of them, he has a right to retain them and carry them on. There seems, however, to be some conflict of authority in regard to the right of the master to demand any thing more than a compensation for the trouble and expense he has been put to in consequence of having to unload the goods. Thus in Clemson *v.* Davidson, 5 Binn. 392, 401, Mr. Justice *Brackenridge* says: "It has been made very clear to me, that the ship-owner had no lien on the goods put on board, beyond the compensation for the taking on board, the stowage, unshipping, and putting on the wharf again, and the demurrage to her sailing which this might occasion, this being before he broke ground." These remarks are *obiter*, the controversy being between two other parties, both of whom were willing to send on the goods. See also, Burgess *v.* Gun, 3 Harris & J. 225. In Keyser *v.* Harbeck, 3 Duer, 373, the master of a vessel gave written receipts to the owner of goods delivered on board, and on these receipts being given up, issued a bill of lading in good faith to the party returning them, who had obtained them by false pretences from the shipper. It was held that the captain was not liable in trover to the shipper, unless the bills of lading were surrendered, or fully indemnified against, and all damages consequent upon the delay necessary to unload them and all expenses of loading and unloading them were paid. Lord *Tenterden*, in his treatise on Shipping, p. 595, states the law as follows: "A merchant who has laden goods cannot insist upon having them relanded and delivered to him, without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him." In Tindal *v.* Taylor, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, the Court of Queen's Bench cite the above passage with commendation, and Lord *Campbell* says: "It is argued that there can be no lien on the goods for freight not yet earned or due; but when the goods were laden, to be carried on a particular voyage, there was a contract that the master should carry them in the ship upon that voyage for freight; and the general rule is, that a contract once made cannot be dissolved except with the consent of both the contracting parties. By the usage of trade, the merchant, if he redemands the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them; but these are conditions to be performed before the original contract can be effected by the demand of the goods. It would be most unjust to the owners and master of the ship, if we were to hold that upon a simple demand at any time the goods must be delivered back in the port of outfit." See also, Thompson *v.* Small, 1 C. B. 328, 354; Thompson *v.* Trail, 2 Car. & P. 334. In Bartlett *v.* Carnley, 19 Law Reporter, 579, an action was brought by the master of a vessel against a sheriff for seizing and removing from his vessel certain goods under an attachment against the shipper, the plaintiff having executed and delivered to the shipper a bill of lading for the goods before the levy of the attachment. The court held that the plaintiff was entitled to recover, by way of dam-

The whole law of freight consists of little else than the application of these two rules or principles. They are of equal force and value; equally ancient and well established; and ought to be equally regarded and enforced in every court. But this is not the case in England, nor indeed in this country. There are obvious difficulties in the enforcement of the lien which the cargo has against the ship, in any court of common law, or even of equity. But admiralty finds no difficulty. The hostility to admiralty in England abridged its power of enforcing this lien there, and at the same time the courts of common law devised no method of their own for doing the same thing with any completeness. Abbott, in his Law of Shipping, (p. 284,) says: "The right of the merchant who would seek to make this privilege available, ranks low in the order of precedence of privileged claims against the ship." He then enumerates a long list of these claims, and says, that "most of them are justly preferred to it." And then adds, "the privilege of the ship-owner against the goods for his freight is of a more beneficial character." But we apprehend that this opinion rests mainly upon the imperfect manner in which the common law of England has adopted the law merchant, and its very successful opposition to that system of judicature, the law of admiralty, which would have supplied

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ages, the freight on the goods, according to the rate stipulated, and the difference between the value of the goods which the plaintiff got after their return to him and the amount paid for the deficiency to the indorsees of the bill of lading, he being prevented from delivering them by the seizure. This question came before the Supreme Court of Massachusetts about the same time that Tindal *v.* Taylor was decided. Bailey *v.* Damon, 3 Gray, 92. The action was assumpsit on a contract whereby the defendants agreed to ship, and the plaintiffs to transport, a certain quantity of lumber to California for an agreed price. The lumber was put on board the vessel, but was afterwards taken away by the defendants. The plaintiffs then procured other merchandise, but at a less freight, and the ship finally sailed. In the court below, the judge ruled that the plaintiffs were entitled to recover the amount of freight and primage which they would have earned if they had taken the lumber to California, adding the demurrage for the time they were delayed to obtain other freight, and deducting the freight they received from other shipments of goods of other persons, and their net earnings on their own shipments. But the court *in banc* held that no freight was due before the commencement of the voyage, and no lien existed for it, and that the voyage did not commence till the ship broke ground. They also held that the plaintiff was entitled to recover full indemnity for the breach of the contract; but in determining this, the diligence used by the ship-owner in procuring another cargo, and the fact whether another voyage might not have been substituted which would have proved more beneficial, should be taken into consideration. A new trial was therefore ordered.

all deficiencies. The lien of the ship on the cargo for the freight is fully as beneficial as he states it to be. But the lien of the cargo on the ship is, in this country, enforced in admiralty by process *in rem* as fully as any other maritime lien whatever. We defer speaking of it particularly until we treat of the Law of Admiralty; here only remarking, that it is enforced with us even against a subsequent purchaser of a vessel, either when he bought with a knowledge of the claim of the cargo, or when he bought so soon after the arrival of the ship that the owner of the cargo had no previous opportunity to enforce his lien.[1]

The owner of the ship carries only his own goods, or carries all of them that he chooses to send, and fills up his ship with the goods of others, or carries only the goods of others. And if he carries only the goods of others, he does this by offering his ship as a general ship, or letting her out by a charter-party.

If he offers his ship as a general ship, this is usually done by advertisement stating the names of the ship and of the master, the general character of the ship, the time of sailing, and the proposed voyage. An owner would not be bound to strict accuracy in all these particulars; but would be obliged to make compensation to a shipper who was injured, without his own fault, by a material misrepresentation in any of these particulars.[2]

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[1] The Rebecca, Ware, 188.

[2] The question has arisen in England whether an advertisement, that a vessel would sail with convoy, amounted to a warranty that she would so sail, or whether it merely meant that such was the intention. In Runquist *v.* Ditchell, 3 Esp. 64, the vessel was just up at the Royal Exchange as a general ship for Oporto, warranted to sail with convoy. She did not so sail, and was consequently lost. The court held that the ship-owners were liable. See also Snell *v.* Marryatt, in K. B. 48 Geo. 3, reported in Abbott on Shipping, p. 320; Sanderson *v.* Busher, 4 Camp. 54, note; and Magalhaens *v.* Busher, 4 Camp. 54. In these last two cases the stipulations in regard to convoy were inserted in the bills of lading. In Runquist *v.* Ditchell, it is stated in the report that the bill of lading contained the warranty in question. The court, however, decided the case on the ground that the advertisement amounted to an express stipulation; and in Sanderson *v.* Busher, *Gibbs*, C. J., stated that the advertisement alone contained the clause in regard to convoy. See also Freeman *v.* Baker, 5 B. & Ad. 797. A case where the same principles are involved has recently been decided by the Court of Exchequer in England, Cranston *v.* Marshall, 5 Exch. 395. The plaintiff applied to the defendants, who were emigration agents, for a passage for himself and family to Australia. By a letter in reply, they agreed to take them for £65. The letter was written on a printed circular, which stated the times of the sailing of the vessels. One of them, the Asiatic, was to sail from London on the 15th of August, and from Plymouth on the 25th. A deposit of £32, 10*s.* was paid. The ship did not sail from London till the

And, if the course or ultimate destination of the ship were changed, it would be the duty of the ship-owner to notice the same in his advertisement, and vary that accordingly.[1]

28th of August, nor from Plymouth till the 4th of September. On the 31st of August the plaintiff sailed from Plymouth in another vessel. The court said: "When parties by advertisement hold out that they are ready to give a written guaranty that a vessel shall sail on a particular day, and a contract is entered into specifically on that footing, in substance that is a warranty to sail on the day named." The question, however, in this class of cases is, what was the intention of the parties, and also, whether time was of the essence of the contract. Thus, in the case above cited, the defendants offered to give a written guaranty that the vessels would sail on such days. For this guaranty nothing extra was to be paid, and the court therefore held that this showed that the guaranty was given by the advertisement and the circular. In Yates *v.* Duff, 5 Car. & P. 369, the court left it for the jury to say whether time was of the essence of the contract, and, if not, whether the ship sailed within a reasonable time. See also Glaholm *v.* Hays, 2 Man. & G. 257; Ollive *v.* Booker, 1 Exch. 416. In Howard *v.* Cobb, U. S. C. C. 19 Law Reporter, 377, it was assumed by Mr. Justice *Nelson*, that time was of the essence of the contract. The case was similar to Cranston *v.* Marshall, *supra*. The vessel did not arrive at the port from which the parties were to sail on the day named, being detained by stress of weather. The court held this to be no excuse, and said: "The contract bound the owner to have his vessel at the place and time designated; that he had stipulated for as a part consideration for the price paid, and assumed upon himself the responsibility of performance; and the failure operated a breach of the engagement, and subjected him to a return of the price paid. The winds and weather are no excuse for the non-fulfilment of a contract as to the time of the commencement of the voyage. If these circumstances had been intended as elements of it, they should have been expressly provided for by the owner, and then all parties concerned would have understood it." See also Denton *v.* The Great Northern R. Co. 5 Ellis & B. 860, 34 Eng. L. & Eq. 154. In Mills *v.* Shult, 2 E. D. Smith, 139, an action was brought against the owner of a steamship for the breach of a condition set forth in a handbill in which the steamer was advertised to sail. It appeared in evidence that when the plaintiff went to buy his ticket he saw at the office a handbill, which stated that the steamer would sail *direct* for New York on a day mentioned. The handbill was signed by A & B as agents of the steamer, of whom also the plaintiff bought his ticket. The vessel sailed on the day mentioned, but did not proceed directly to New York, but stopped on the way to perform a salvage service, for which her owners were paid. The ticket bought by the plaintiff was recognized on board as a valid one. The court held that these facts were not sufficient of themselves to warrant the presumption that A & B were the agents of the steamer, and so authorized to bind the company. The correctness of this decision we are inclined to doubt.

[1] In Peel *v.* Price, 4 Camp. 243, *Gibbs*, C. J. said: "When a card has been published, advertising a ship for a specific voyage, if that be altered, I am of opinion that the owner is bound to give specific notice of the alteration to all persons who afterwards ship goods on board the vessel, and that he is otherwise answerable for the loss which they sustain by supposing that the destination of the vessel remains unaltered."

SECTION II.

OF THE BILL OF LADING.

The reception of the goods by the master on board of the ship, or at a wharf or quay near the ship, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship to the safe carriage and delivery of the goods.[1]

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[1] In Molloy, b. 2, c. 2, § 2, the law is stated as follows: "And therefore so soon as merchandises and other commodities are put aboard the ship, whether she be riding in port, haven, or any other part of the seas, he that is *Exercitor navis* is chargeable therewith. In Goff *v.* Clinkard, cited in Dale *v.* Hall, 1 Wilson, 281, an action was brought against a master of a ship who undertook to carry goods from London to Amsterdam. A puncheon of rum was delivered on board, and, while being let down into the hold, was staved. A verdict was rendered for the plaintiff, though the defendant proved that he endeavored to let it down with all possible care. See also Morse *v.* Slue, 1 Vent. 190; Rich *v.* Kneeland, Hob. 17; Williams *v.* Peytavin, 4 Mart. La. 304. In Cobban *v.* Downe, 5 Esp. 41, an action was brought against a wharfinger to recover the value of goods which had been delivered to the mate of a vessel by the wharfinger. Lord *Ellenborough* held, that, under these circumstances, the liability of the wharfinger had ceased, because that of the vessel had commenced. As soon as a delivery is made, the vessel is bound. Faulkner *v.* Wright, 1 Rice, 107; Greenwood *v.* Cooper, 10 La. Ann. 796; Clarke *v.* Needles, 25 Penn. State, 338; Snow *v.* Carruth, U. S. Dist. Ct. Mass. Dist. 19 Law Reporter, 198. In this last case the damage was done to the goods after they were delivered, but before the bills of lading were signed. See also Greenwood *v.* Cooper, 10 La. Ann. 796. Mr. Justice Betts has, however, in a recent case in the District Court of New York, held that a vessel is not liable *in rem* until the goods are on board, although they have been delivered to the officers of the vessel, Dill *v.* The Bertram. In support of this the following cases are cited. The Sch. Freeman *v.* Buckingham, 18 How. 182; Vandewater *v.* Mills, 19 How. 82; The Young Mechanic, 2 Curtis, C. C. 404; The Kiersage, 2 Curtis, C. C. 421. But, after a careful examination of these cases, we are entirely of the opinion that they do not support the principle contended for by Mr. Justice Betts, although there are dicta in some of them which seem to lead to such a conclusion; but the points actually decided are in every respect consistent with the law as stated in the text. See note 1, p. 135. In Trowbridge *v.* Chapin, 23 Conn. 595, goods were delivered on board a steamer, which was a common carrier between New York and New Haven. The defendant proved that the clerk of the boat was the only person whose duty it was to receive freight and give receipts for it. The goods were taken on board by a porter, who testified that he saw but one man on board, who was either a deck hand, or one employed to sweep the decks. He told this man that he had goods for New Haven, and the man told him to put them down

We say any person *on board;* but it is not unusual in some of our commercial cities, for the bill of lading to be signed and delivered in the counting-room of the owners, by a clerk of the owners. If he says, "A B, for C D, the master of said ship," the master would only be held by it being proved that he had given this authority, which, however, might be inferred from his knowledge and assent, or even knowledge and silence. Then the master and owners would be bound in the same way as if he signed it himself.[1] If the clerk says, "A B, for E F, etc., owners of ship, etc." the owners would be bound on proof of authority, which would be inferred from knowledge and assent or usage. But it may be open to doubt whether this would bind the ship, the owners, and the master, in the same way and to the same extent as a bill of lading signed by the master. Perhaps, however, the courts would give it, substantially, the same effect. We are not aware of any adjudications on this precise question.

If a written receipt is given for the goods, the obligation is no stronger, but the receipt is *primâ facie* and very strong evidence

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in a certain spot. He then left without making any further inquiry. A majority of the court, consisting of three judges, held that, as the deck hand was not the agent of the boat for the purpose of receiving freight, the owners had incurred no liability. The Chief Justice and the remaining judge held that the porter had a right to presume that the man had been left in charge by the proper officers of the boat, and that the rule, that where one of two innocent persons must suffer by the fraud of another, the loss shall fall on him who placed that person in a situation to commit the fraud, applied. They therefore were of opinion that the defendant should be held. The Chief Justice, in the course of his opinion, gives this illustration: "Suppose a quantity of freight had been shipped by the boat from New Haven to a merchant in New York, and a carman had taken it and carried it to the merchant's store, which he found open and no one in, or about it, except a man at work in the store, would not the carman be justified in leaving the goods deposited in the store, in the manner directed by the man at work?" The dissenting opinion pronounced by the learned Chief Justice seems to us to be better founded on principle and authority than the decision of the majority of the court. The mere putting of the goods on the deck, without a delivery to some one on board authorized to receive them, is clearly not good. In Wright *v.* Caldwell, 3 Mich. 51, a distinction was taken between the delivery to be made by a passenger and by a freighter. A person intending to take passage on a steamboat brought his trunk on board and put it in the usual place for baggage, but did not deliver it to any one on board. Through mistake he did not take passage, and the trunk was lost. It was held that he must sue either in the character of passenger or freighter. That as passenger the delivery was good, but as he did not take passage he could not recover, and as freighter, he had not made a good delivery.

[1] Putnam *v.* Tillotson, 13 Met. 517.

of the reception of the goods.[1] If, however, a bill of lading is given, this has an important influence over the rights and obligations of the parties.

The bill of lading is a very ancient document; in general use among all commercial nations, and is much the same in its form and provisions in various countries;[2] and long and repeated adjudications have left but few open questions as to its effect. The usual form we give in our Appendix. It is now quite common for our railroad companies, and perhaps other carriers, to give a receipt closely resembling a bill of lading; but it is intimated in a recent English case, that the bill of lading is properly a sea document, not applicable to land carriage, or inland carriers by water.[3] We do not know, however, any important consequences or influences of a bill of lading as used in shipping which might not be applied to a similar document in case of land carriage, if the facts and circumstances were, in other respects, similar. It is in substance the written acknowledgment of the master that he has received such goods as it describes, for the voyage stated, to be carried on the terms stated, and delivered to the persons specified in the bill.[4] It is a document of

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[1] By the usual course of trade in England and in this country, the master or mate signs a receipt for the goods, at the time of the shipment, and delivers it to the shipper. The master should then be careful not to give a bill of lading till the receipt is given back to him. If he does, he will render himself doubly liable. Beawes, Lex Mercatoria, p. 127; Abbott on Shipping, 346; Craven *v.* Ryder, 6 Taunt. 433; Bryans *v.* Nix, 4 M. & W. 775; Evans *v.* Nichol, 3 Man. & G. 614; Thompson *v.* Small, 1 C. B. 328; Gosling *v.* Birnie, 7 Bing. 339; Ruck *v.* Hatfield, 5 B. & Ald. 632; Hawes *v.* Watson, 2 B. & C. 540; Jones *v.* Bradner, 10 Barb. 193; Merc. Mut. Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Keyser *v.* Harbeck, 3 Duer, 373.

[2] Pothier on Maritime Contracts, Cushing's Trans. p. 11, § 16; Beawes, Lex Mercatoria, 146.

[3] Bryans *v.* Nix, 4 M. & W. 775. In New York, a bill of lading, given for goods to be transported by a canal, is called a commercial instrument. Dows *v.* Greene, 16 Barb. 72. See also, Grove *v.* Brien, 8 How. 429.

[4] O'Brien *v.* Gilchrist, 34 Maine, 554; Wolfe *v.* Myers, 3 Sandf. 7; Ward *v.* Whitney, 3 Sandf. 399; Knox *v.* The Ninetta, Crabbe, 534; May *v.* Babcock, 4 Ohio, 334; Wayland *v.* Mosely, 5 Ala. 430; Dickerson *v.* Seelye, 12 Barb. 99. Because the bill of lading must be signed by the master or by some one authorized by him, and must state by whom the goods are shipped, and where, and to whom they are to be delivered, the following instrument was held not to be a bill of lading: "Elmira, July 2, 1842, shipped on boat Occidental, H. Banks, captain, 52,900 feet white pine boards and plank, to Albany." This was signed by the agent of the consignor, and delivered to the captain. Covill *v.* Hill, 4 Denio, 323.

great force, and therefore should not be signed and delivered until the goods are actually received, (and if only *signed*, but not *delivered*, it has no force,) [1] nor should it contain any statements but those which are exactly accurate. If it be signed before the goods are received on board, or even before the shipper owns them or has bargained for them, it might nevertheless apply, as between the *master* and the *shipper*, to any goods shipped afterwards as and for those which are named in the bill of lading. But, in general, as the master has no authority to sign a bill of lading until the goods are received, such a bill would not bind his owners.[2]

Although the ship-owner may show that the goods were injured or destroyed on the passage by reason of some intrinsic defect which was not apparent or easily to be ascertained when the goods were shipped, yet the bill is *primâ facie* evidence that they were at that time in the condition in which they are described as being in the bill itself.[3] If the ship-owner defends

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[1] Buffington *v.* Curtis, 15 Mass. 528; Allen *v.* Williams, 12 Pick. 297. But in the case of The Peytona, 2 Curtis, C. C. 21, it has been held that an agreement for a bill of lading might bind the master, although none were signed or delivered.

[2] In Rowley *v.* Bigelow, 12 Pick. 307, *Shaw*, C. J., said: "The bill of lading acknowledges the goods to be on board, and regularly, the goods ought to be on board before the bill of lading is signed. But if, through inadvertence or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the ship-owner's warehouse, or in the shipper's own warehouse, at hand and ready, and afterwards they are placed on board, as and for the goods embraced in the bill of lading, we think, *as against the shipper and master*, the bill of lading will operate on these goods by way of relation and by estoppel." The controversy in this case arose between the former owners of some corn, which was obtained from them by fraud, and the *bonâ fide* indorsees of a bill of lading given to the person thus obtaining the corn, and by him sent to the defendants. But the question arises whether if a captain sign bills of lading before the goods are on board, or delivered to some one authorized to receive them, and they are never shipped, the owners of the vessel are estopped from showing this fact in a suit brought against them for non-delivery by *bonâ fide* indorsees of the bill of lading. It is clear that they are not. It is a fraud on the part of the master to sign the bills before the goods are on board, and an act not within the scope of his authority as master. And the owners therefore are not liable. Lickbarrow *v.* Mason, 2 T. R. 63, 75, per *Buller*, J.; Grant *v.* Norway, 10 C. B. 665, 2 Eng. L. & Eq. 337; Hubbersty *v.* Ward, 8 Exch. 330, 18 Eng. L. & Eq. 551. See also, Coleman *v.* Riches, 16 C. B. 104, 29 Eng. L. & Eq. 323. Nor, in such a case, is the vessel liable *in rem*. Sch. Freeman *v.* Buckingham, 18 How. 182.

[3] In Hastings *v.* Pepper, 11 Pick. 41, an action was brought against the master of a vessel, to recover the value of a glass bottle containing twenty pounds of oil of cloves.

against the claim of the shipper on the ground of intrinsic defect, he might doubtless discharge himself by proof of such defect, whether apparent or not, unless the contract were one which amounted to or implied warranty to carry the goods and take the risk of that defect.[1] But if the claim were made by a

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The receipt of the box, containing the bottle, on board the vessel was acknowledged, but the defendant contended that the breaking of the bottle was owing to its being insufficiently packed, and that the bottle itself was imperfect, and not well annealed. *Shaw*, C. J., said: "It may be taken to be perfectly well established, that the signing of a bill of lading acknowledging to have received the goods in question, in good order and well conditioned, is *primâ facie* evidence, that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier, and of course the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." See also, Clark *v.* Barnwell, 12 How. 272; Cariss *v.* Johnston, Ang. on Carriers, § 213, n.; Barrett *v.* Rogers, 7 Mass. 297; McIntosh *v.* Gastenhofer, 2 Rob. La. 403; Price *v.* Ship Uriel, 10 La. Ann. 413; Bissel *v.* Price, 16 Ill. 408. In Ellis *v.* Willard, 5 Seld. 529, it was held that the statement in the bill of lading, that the goods were received in good order, would not prevent the carrier from showing that this was incorrect, and that it made no difference whether the goods were open to inspection or not.

[1] Guidon, ch. 7, art. 7, 10; Clark *v.* Barnwell, 12 How. 272; The Ship Howard *v.* Wissman, 18 How. 231; McIntosh *v.* Gastenhofer, 2 Rob. La. 403; Bissel *v.* Price, 16 Ill. 408. In Clark *v.* Barnwell, a quantity of cotton thread was shipped at Liverpool, under a common bill of lading for a voyage to Charleston, S. C. On its arrival, the thread was found to be stained and spotted by dampness and mould caused by the humidity of the atmosphere of the hold, in a long passage, and by the transition from a colder to a warmer climate. The court held that damage caused by humidity, in the absence of any defect in the ship, or navigation of the same, or in the stowage, was a peril of the sea, for which the carrier was not liable. They said: "For it has been held, if the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss, as well as pay the freight." In Lamb *v.* Parkman, U. S. Dist. Ct., Mass., 20 Law Reporter, 186, an action was brought on a charter-party for freight. The defence was set up that the goods were damaged by *sweat*. The vessel came from Calcutta, and the damage was caused by the condensation of vapor in the hold by the transition from a warm to a cold climate, producing moisture directly under the upper deck, whereby the upper part of the cargo was injured. Mr. Justice *Sprague* held, that, as the goods were stowed in the usual manner, the ship-owners were not responsible for the damage, and freight was therefore due.

If a cargo of hides is liable to perish from worms, and the heat of the vessel, at an intermediate port, it is the duty of the master to preserve them by having them beaten or ventilated. The Bark Gentleman, Olcott, Adm. 110. This case was reversed on

purchaser of the goods and indorsee of the bill, who bought on the faith and evidence of the bill, then it should seem that the ship-owner should not be able to defend himself by showing a defect which was actually known, or which was of such a nature that it might easily have been discovered when the bill was signed.[1] Between the ship-owner and the shipper of the goods, the bill is certainly not conclusive; but if it has altered the situation of parties relying on its truth, so that either an innocent party must suffer, or else the ship-owner, whose agent signed the bill, either fraudulently or heedlessly, it is he, and not the innocent party, who should bear the loss.[2]

The party who ships the goods is called the consignor; and he to whom the goods are to be delivered by the terms of the bill

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appeal, 1 Blatchf. C. C. 196, but the law on this point was not controverted. See also, Soule *v.* Rodocanachi, 1 Newb. Adm. 504.

[1] See next note.

[2] Abbott, in his treatise on Shipping, p. 324, says that between the shipper and the ship-owner a bill of lading is not conclusive, citing Bates *v.* Todd, 1 Moody & R. 106, and Berkley *v.* Watling, 7 A. & E. 29. In the first of these cases, the captain had been induced, through the fraud of the plaintiff's agent, to sign the bill of lading for eight hundred and ninety bags of pepper, whereas the defendants claimed that only seven hundred and ninety had been in fact shipped. The court held that it was a question of fact for the jury, what number had actually been put on board. In Berkley *v.* Watling, the action was brought against two owners of a vessel, one of whom had shipped the goods in question to the plaintiff. The court held that the other owner was not estopped by the bill of lading from showing that the goods were never put on board, because the law presumed that the plaintiff was aware of the fact, it being known to his agent. In Wolfe *v.* Myers, 3 Sandf. 7, *Oakley*, C. J., said: "Ordinarily, a bill of lading partakes of a twofold character. It is both a receipt and a contract. It is a receipt as to the number of bushels, or the quantity of the article put on board the vessel, and it is a contract to deliver the same at a certain place and to a certain party. As far as it is a receipt, it is no doubt open to explanation between the parties to it. The party giving it may prove that he was mistaken in the quantity of goods delivered to him. But in its character of a contract, it cannot be altered or explained by parol." See also, Ward *v.* Whitney, 3 Sandf. 399; Dickerson *v.* Seelye, 12 Barb. 99. In this case, *Edmonds*, J., in delivering the opinion of the court, said: "As between the shipper of the goods and the owner of the vessel, a bill of lading may be explained so far as it is a receipt, that is, as to the quantity of the goods shipped, but as between the owner of the vessel and an assignee for a valuable consideration, paid on the strength of the bill of lading, it may not be explained." See also, O'Brien *v.* Gilchrist, 34 Maine, 554; Knox *v.* The Ninetta, Crabbe, 534; Benjamin *v.* Sinclair, 1 Bailey, 174; Backus *v.* The Sch. Marengo, 6 McLean, C. C. 487; Wayland *v.* Mosely, 5 Ala. 430; May *v.* Babcock, 4 Ohio, 334; Sutton *v.* Kettell, U. S. Dist. Ct., Mass., 18 Law Reporter, 550, The Henry, 1 Bl. & Howl. Adm. 465, 485; Bissel *v.* Price, 16 Ill. 408; Butler *v.* The Arrow, 1 Newb. Adm. 59.

is the consignee. The shipper himself is sometimes consignee as well as consignor; that is, the goods are deliverable to him or to his assigns. And if no person is named as consignee, (which is, however, unusual,) then the law-merchant, or usage, inserts the name of the consignor, and gives to the bill the same effect as if he were the consignee.[1]

The bill of lading is often called a negotiable instrument;[2] but it is not so, quite to the extent of a note payable to order, and it is called in later cases, more accurately, perhaps, *quasi negotiable*. It will be noticed that the word "assigns" is used, and not the word "order;" but although at common law the mere use of the word "assigns" would not make a *chose in action* transferable, the law-merchant makes a bill of lading so far transferable by indorsement that an indorsee may sustain an action against the owner or master, founded on his ownership of the goods, such indorsement, with delivery, being *primâ facie* evidence of the transfer of the goods to him.[3] But he cannot, gen-

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[1] In Chandler *v.* Sprague, 5 Met. 306, A. of Brazil was indebted to P. H. & Co. of New York. At their request, and to pay his debt to them, he shipped goods to this country, on his own account and risk, under bills of lading, making the goods deliverable to his own order, and indorsed by him in blank. The bills of lading were sent to H. & Co. of New York, successors to P. H. & Co., with authority to make the goods thereby deliverable to themselves, or such persons as they might name, with authority to sell the goods, and to apply the proceeds to the payment of their own debt. On the arrival of the goods, H. & Co. filled up the bills of lading, making the goods deliverable to the plaintiffs, who were to sell them and account for the proceeds to P. H. & Co. The plaintiffs received the goods, and afterwards they were attached by the defendant, a deputy sheriff, as the property of P. H. & Co. The court decided in favor of the plaintiffs. They said: "In the first place, we are of opinion that no property in these goods vested in P. H. & Co. Had they filled up the blank in the bill of lading, as they had authority to do, so as to make the goods deliverable to themselves, and accepted the consignment, the property would have vested in them as consignees liable to account to the consignor." The court also said, that, although A., the consignor, was not in strictness the consignee, yet he had a right to direct the delivery of the property in any way he might think fit, and by sending the invoice and bills of lading to H. & Co., and authorizing them to name the consignee, and by their naming the plaintiffs the property thereby vested in them. See also, Turner *v.* Trustees of The Liverpool Docks, 6 Exch. 543, 6 Eng. L. & Eq. 507; Ellershaw *v.* Magniac, 6 Exch. 570, n.; Wait *v.* Baker, 2 Exch. 1; Van Casteel *v.* Booker, 2 Exch. 691; Key *v.* Cotesworth, 7 Exch. 595, 14 Eng. L. & Eq. 435; Brown *v.* North, 8 Exch. 1, 16 Eng. L. & Eq. 486.

[2] Evans *v.* Marlett, 1 Ld. Raym. 271; Lickbarrow *v.* Mason, 2 T. R. 63, 1 H. Bl. 357, 6 East, 21, n.; Wright *v.* Campbell, 4 Burr. 2046; Hibbert *v.* Carter, 1 T. R. 745; Jenkyns *v.* Usborne, 7 Man. & G. 678, 698.

[3] If the action is brought upon the bill of lading, it must be in the name of the

erally, sue *on the bill of lading* in his own name. It is said that even if the word assigns be omitted, an order written and signed by the consignee on the back of the bill, with delivery of it, binds the ship to the delivery of the goods to the indorsee.[1]

Undoubtedly, an indorsement and delivery of the bill of lading is binding only when it is made for good consideration, and by a party having the right to indorse; and we add, for a *new* consideration. For we hold the law to be, that an indorsement of the bill, in payment or security of the previously existing debt of the consignee, is no bar against the consignor's right to stop the goods *in transitu*, unless the indorsee has in some way lost some valuable right or remedy by accepting this payment or security, which would, indeed, amount to a new consideration. And we should be disposed to extend this rule further, and say that an indorsee only for such payment or security of a previous debt, would, like an indorsee for no consideration, be unable to recover the goods as against one who, for good consideration, and in good faith, subsequently acquired a title to the goods and possession of them, either as transferree, or as attaching creditor.[2]

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original promisee. Thompson *v.* Dominy, 14 M. & W. 402. In Howard *v.* Shepherd, 9 C. B. 297, 319, *Maule*, J., said: "Now it is perfectly clear, that a contract cannot be transferred, so as to enable the transferree to sue upon it." See also, Sanders *v.* Vanzeller, 4 Q. B. 260, 295; Tindal *v.* Taylor, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, 216; Dows *v.* Cobb, 12 Barb. 310; Lineker *v.* Ayeshford, 1 Cal. 75. The assignee may, perhaps, sue in admiralty in his own name, for in Howard *v.* Cobb, 19 Law Reporter, 377, Mr. Justice *Nelson* says: "It is every day's practice in admiralty to allow suits to be brought in the name of the assignee of a *chose in action*." See also, Mutual Safety Ins. Co. *v.* The Cargo of The Brig George, Olcott, Adm. 89; The Sch. Mary Ann Guest, id. 498. But even if the assignee cannot maintain an action on the contract, yet if the right of property and of possession be in him, he can sue the master for detaining or converting the goods, and the latter would be estopped from denying that he had them after the declaration in the bill of lading, on the faith of which the indorsee had bought and paid for them. Tindal *v.* Taylor, *supra*.

[1] So held at Nisi Prius, by Lord *Tenterden*, C. J., Renteria *v.* Ruding, Moody & M. 511.

[2] In Newsom *v.* Thornton, 6 East, 17, the plaintiffs consigned certain barrels of pork to one Church, their factor in London, on the joint account of themselves and Church. By the bills of lading, the pork was deliverable to Church or his assigns. Previous to the arrival of the pork, Church obtained a loan of £200 from the defendants, and agreed with them, in consideration of a further advance, to leave with them an order on his clerk, as he himself was about leaving for Ireland, to indorse and deliver to them the bill of lading for the pork when it arrived. After his departure, the defendants contrived to obtain from the clerk the bill of lading indorsed to them, without payment of the sum agreed on, and claimed to hold it as indorsees for a valuable

An agreement, on good consideration, by a consignee to assign upon receipt of the bill is an assignment, or, at least, an equitable assignment of the bill of lading, valid against all subsequent assignees with notice.[1]

The property in goods for which a bill of lading is given, may, of course, be legally transferred for good consideration to any purchaser without indorsement and delivery of the bill; but it is not only the most usual, but by far the most proper way of doing this, to indorse the bill; unless the goods have already been delivered to the consignee, so as to discharge the bill.[2]

If the bill of lading itself contains a condition, or if the indorsement be made upon a condition, the possessor of the bill cannot, by means of it, claim possession of the goods, unless the condition is satisfied.[3]

Bills of lading are usually signed in sets of three. One is held by the master; one retained by the consignor, and one sent, either with the goods or by a separate conveyance, to the con-

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consideration, namely, their previous advance to Church. But the court held, that, not having advanced the sum agreed upon, there was no consideration, and that they could not hold it for their previous debt. See also, Snaith *v.* Burridge, 4 Taunt. 684; Warner *v.* Martin, 11 How. 209, 225.

[1] Walter *v.* Ross, 2 Wash. C. C. 283, 289, per Mr. Justice *Washington*.

[2] If a party claims a right to the goods *by reason of a bill of lading*, it is necessary that it should be both indorsed and delivered to him. Buffington *v.* Curtis, 15 Mass. 528; Allen *v.* Williams, 12 Pick. 297. But where a merchant in Boston ordered merchandise to be shipped to him from Liverpool on board a general freighting vessel, designated by him for that purpose, and the goods were shipped in pursuance of those orders, and a bill of lading given by which they were made deliverable to the merchant in Boston, it was held by the court that the shipper could not, by withholding the bill of lading and subsequently inclosing it and the invoice in a letter to his agent, with directions to deliver it to the merchant in Boston only upon payment for the merchandise, convert the absolute delivery into a conditional one, or divest the merchant of his property in the goods. The court said: "This conclusion is founded, not upon the supposed specific effect of executing or delivering a bill of lading, or the peculiar character supposed to be attached to a bill of lading as a *quasi* negotiable instrument, but upon the general principle of the common law, applicable to the sale of personal property." Stanton *v.* Eager, 16 Pick. 467. In Allen *v.* Williams, 12 Pick. 297, 302, the court said: "Even a sale or pledge of the property without a formal bill of lading by the shipper, would operate as a good assignment of the property, and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs."

[3] Barrow *v.* Coles, 3 Camp. 92; Mitchel *v.* Ede, 11 A. & E. 888; Brandt *v.* Bowlby, 2 B. & Ad. 932; Walley *v.* Montgomery, 3 East, 585.

signee. If the consignor chooses to do so, he may send his copy of the bill to the consignee by another conveyance. If the bill contains the name of the consignee, and the bill is sent to him, this completes the title of the consignee; the goods are his, and are carried at his expense and risk; subject only to the right of the consignor to stop the goods for any breach of the conditions of sale before their actual arrival into the possession of the consignee.[1] If the consignor be himself consignee, and sends the bill to a third party, who has ordered the goods, or is to receive them, either indorsed to him or indorsed in blank, it is the same thing as if such person were named as consignee in the bill.[2] If the consignor, being also consignee, sends such a bill without indorsement, the party receiving it acquires no rights under it,

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[1] Walley *v.* Montgomery, 3 East, 585. In this case the consignor sent to the consignee an invoice of the goods laden on board the vessel, and also a bill of lading in the usual form. By the terms of the invoice, the goods were "for account and at the risk of the consignee." By the bill of lading the goods were deliverable on payment of freight as per charter-party. The letter of advice, also, informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo. In an action of trover brought by the consignee against the agent of the consignor, who had obtained possession of the goods under another bill of lading, Lord *Ellenborough* said that but for the invoice he should be of opinion that the plaintiff was not entitled to recover, because the bill of lading and the letter of advice tended to show that two things were to be done by the plaintiff before the property in the goods was to vest in him, first the acceptance of the bills, and second the payment of freight, and the plaintiff having offered to perform only the first, would not be entitled to recover but for the invoice, which showed that the goods were shipped for account, and at the risk of the consignee. And, generally, if the consignee's name is inserted in the bill of lading, and the bill is sent to him, the property in the goods vests in him against any person except a previous assignee of the bill of lading. Allen *v.* Williams, 12 Pick. 297; Stanton *v.* Eager, 16 Pick. 467.

[2] Haille *v.* Smith, 1 B. & P. 563; Chandler *v.* Sprague, 5 Met. 306, which see at length, *ante*, p. 138, note 1; Van Casteel *v.* Booker, 2 Exch. 691; Ellershaw *v.* Magniac, 6 Exch. 570, n. In this case the plaintiff had entered into a contract with A & B for the purchase of some linseed. A & B drew upon him for the price, and the bills of exchange were accepted and duly paid by the plaintiff. To procure the linseed, he entered into a contract of charter-party for the hire of a certain ship to proceed to Odessa and obtain it. The linseed was delivered on board. The bills of lading stated that it was shipped by A & B, deliverable to order or assigns. A & B afterwards indorsed the bills of lading to one Peel, who transferred them to the defendants. On this state of facts, the court held that no property in the linseed had passed to the plaintiff; that the form of the bill of lading showed that the shippers intended to preserve the right of property and possession in themselves, until they had made an assignment of the bill of lading to some other person; and that, the defendants being indorsees for a valuable consideration, the right of property was in them. See also, Wait *v.* Baker, 2 Exch. 1.

but only has notice by it that such goods are shipped in such a vessel to such a port.[1] And it is quite common for the consignor to send such a bill to the party ordering the goods, and then to send to the agent of the consignor in the same port or country a bill indorsed to that agent, or to the party ordering the goods, or in blank, with orders to deliver the bill, or to receive the goods and deliver them, if payment be made or secured, or such conditions as the consignor chooses to prescribe be complied with. This prevents all question as to the right of the consignor to retain them for the price; although it might raise a question whether the goods in this case ever were sold by the consignor, and consequently, whether his holding them until the price is paid or secured, could be considered as a stoppage *in transitu*.

If this precaution be not taken, but the party ordering the goods is made consignee in the bill which is sent to him, the consignor runs the risk of his getting them into his possession, or transferring them by an indorsement for good consideration before the consignor can stop them *in transitu*. For shipping goods to one who has ordered them, is, in general, a completed sale, vesting the property in him, and is a *constructive* delivery, subject only to be defeated by stoppage for the price before actual delivery.[2] The obligation of the master to deliver the goods according to the bill of lading is so strong, that, where an unindorsed bill was sent to one ordering the goods, and he obtained possession by assuring the master that the goods were sent to him, and were his own and deliverable to him, and the shipper sued the ship-owner on the bill, who defended himself on the ground that the party to whom the goods were delivered was in fact the owner of them, and had a right to them, it was admitted, both by court and counsel, that if the defendant established the title and right of that party, the plaintiff must still recover against him, although with only nominal damages.[3]

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[1] Nix *v.* Olive, cited in Abbott on Shipping, 538; Brandt *v.* Bowlby, 2 B. & Ad. 932; Coxe *v.* Harden, 4 East, 211.

[2] Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 582; Brown *v.* Hodgson, 2 Camp. 36; Evans *v.* Marlett, 1 Ld. Raym. 271; Snee *v.* Prescot, 1 Atk. 245; Swain *v.* Shepherd, 1 Moody & R. 223; Fragano *v.* Long, 4 B. & C. 219; Stanton *v.* Eager, 16 Pick. 467.

[3] Brandt *v.* Bowlby, 2 B. & Ad. 932.

The bills of lading are evidence against the master or the owner of the ship, not only as to the reception of the merchandise, but as to any material fact stated in them respecting the quantity, or quality, or any other element in the description of the goods.[1] It is therefore usual to describe them only as so many boxes, or bales, or parcels, numbered and marked as per margin; sometimes the words "contents unknown," or "said to contain," etc., are added; and if the words "containing," etc., are added, which is also not unusual, the master and ship are held only to deliver the boxes as they were received by them.[2] The evidence of the bill of lading, however, is not conclusive as between the ship-owner and shipper, but may be rebutted by showing mistake or fraud.[3] It is not usual for the right of lien on the goods for the freight to be expressly reserved by the owner; but whether it is so or not, the law-merchant gives this lien.[4] The master is bound to deliver, and the shipper is bound to pay; nor can the master demand his freight, without being ready to deliver the goods on payment of it, nor can the shipper demand his goods without a tender of the freight.[5] But al-

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[1] In Hall *v.* The Ship Chieftain, 9 La. 318, a quantity of iron was shipped on board a vessel. The bill of lading contained the usual clause stating it to have been received in good order and condition. On delivery, the iron was found to be much rusted. It was held that a paper written and signed by the shippers, and sent to the captain of the vessel, stating that the iron was rusty when shipped, would control the statement in the bill of lading, and exonerate the carriers from their liabilities. See also, cases cited *ante*, p. 135, n. 2, and p. 137, n. 2.

[2] In Clark *v.* Barnwell, 12 How. 272, the bill of lading contained the usual clause that the boxes containing the goods were shipped in good order, "contents unknown." The court said: "It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, condition of it at the time received on board, or whether properly packed or not in the boxes." See also, Vernard *v.* Hudson, 3 Sumner, 405; Valin, Com. sur l'Ord. de la Mar. Liv. 3, tit. 2, art. 2. But even if the bill of lading does not contain these words, evidence is admissible to show that the goods were damaged at the time they were received by the carrier, though such damage was not apparent. Bissel *v.* Price, 16 Ill. 408; The Colombo, U. S. C. C. New York, 19 Law Reporter, 376; Ellis *v.* Willard, 5 Seld. 529.

[3] See cases cited *ante*, p. 137, note 2.

[4] See cases *ante*, p. 125, n. 1.

[5] The usual clause in the bill of lading, that the goods are to be delivered on payment of freight, shows that these two acts are concurrent, and that neither party can sue on the contract without an offer to perform his part of it. Thus in Lane *v.* Penniman, 4 Mass. 91, *Parsons*, C. J., says: "Although the master may retain the cargo

though the law gives this lien, though it be not expressly reserved, yet it does not give it where it is expressly waived, or where it is waived by implication and necessary construction. As the right of lien, at common law, means precisely the right of retaining or continuing possession until the price is paid, if the bargain be that freight shall be paid in so many days after arrival and delivery of the goods, this is held to mean that that the goods are to be delivered first, and at a future day the freight is to be paid; and this, of course, is destructive of the idea of a continued possession by the master or owner of the ship, and consequently of his lien. So the courts of law have generally held.[1] We think, however, that the influence of the

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until the freight be paid or tendered, yet he must be ready to deliver the cargo on payment or tender. See also, Palmer *v.* Lorillard, 16 Johns. 348; Frothingham *v.* Jenkins, 1 Cal. 42; Isham *v.* Greenham, 1 Handy, 357; Certain Logs of Mahogany, 2 Sumner, 589. See also, Möller *v.* Young, 5 Ellis & B. 755, 34 Eng. L. & Eq. 92, reversing the same case in the Queen's Bench, 5 Ellis & B. 7, 30 Eng. L. & Eq. 345.

[1] The law seems now to be well settled, that, where the time and place of the payment of the freight are inconsistent with the right of lien, it will be considered as waived. What will be regarded as such an inconsistency, is said by Chanceller *Kent* to be, "When the payment of the freight is, by agreement, postponed beyond the time, or is at variance with the time and place for the delivery of the goods." 3 Kent, 221. In The Schooner Volunteer, 1 Sumner, 551, 569, *Story*, C. J., said: "If the delivery of the goods is, by the charter-party, to precede the payment, or security of payment of freight," there will be no lien. In Chandler *v.* Belden, 18 Johns. 157, 162, it was held not to exist when the cargo was to be delivered before the arrival of the periods of payment. It was so held also in Alsager *v.* The St. Katherine's Dock Co. 14 M. & W. 794, where freight was to be paid two months after delivery. This subject has recently undergone an elaborate investigation by the Supreme Court of the United States in the case of Raymond *v.* Tyson, 17 How. 53. The suit was brought by a libel in admiralty in the District Court of the United States for the Northern District of California. The case was then taken to the circuit, and thence to the supreme court. The vessel was chartered for a voyage from London to Cardiff, to load for a port on the Pacific, where she was to be employed between such ports as the charterers might elect; thence to be returned back, either to New York or Great Britain, at their option. The vessel was to be employed for fifteen months, with a privilege to the charterer to extend it to twenty-four months. Two thousand dollars per month was to be paid for the use of the vessel. This payment was to be made semiannually in New York. The court held, that, under these circumstances, the ship-owners had no lien on the cargo for the freight, or for the sum agreed to be paid for the use of the ship. The court said: "The next rule for the construction of charter-parties, deduced by us from an examination of all the leading cases in the English and American reports, including those cited in the argument of the counsel of the appellee, is this: that though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight, properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as

common law on the privilege of the ship-owner against the cargo, for his freight, has essentially modified, and not improved, the principles of the law-merchant in this respect. These principles would not hold such a bargain as necessarily inconsistent with this lien, or rather this security; for the substantial meaning of the lien is, that the ship-owner looks to the goods as security for the freight earned by carrying them; and if the goods are held to secure the payment of the freight at a certain time, and are delivered to the consignee with that understanding, we do not see why it should be inconsistent with the law of lien, that the ship-owner has still a security on the goods for his freight, until a *bonâ fide* sale is made of them. We think the question should always be, whether the ship-owner intended to give up that security for his freight, which he had by his contract upon the goods; if he did, the court will not revive his lien; if he did not, the court should in some way, if in its power, give him that security without violating the terms of the agreement; that is, without requiring immediate payment of freight, if a delay of payment has been agreed upon.[1]

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having been waived, without words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer." In the case of The Schooner Volunteer, *supra*, it was held that a stipulation that freight should be paid ten days after the return of the ship was not necessarily inconsistent with the right of lien. See also, Certain Logs of Mahogany, 2 Sumner, 589; Ruggles *v.* Bucknor, 1 Paine, C. C. 358; Cowell *v.* Simpson, 16 Ves. 275; Chase *v.* Westmore, 5 M. & S. 180; Crawshay *v.* Homfray, 4 B. & Ald. 50; Pinney *v.* Wells, 10 Conn. 104, 115; Pickman *v.* Woods, 6 Pick. 248; Belcher *v.* Capper, 4 Man. & G. 502; Lucas *v.* Nockells, 4 Bing. 729; Hornecastle *v.* Farran, 3 B. & Ald. 497. In Hammond *v.* M'Crie, Q. B. 1855, 32 Eng. L. & Eq. 210, it was held that an agreement, concerning a cargo of lead, that it should be weighed as landed, to ascertain when five tons had been discharged, and freight was to be then paid for each five tons as weighed, would give the master no right, after a portion of the lead was on the wharf to cart it away to his own warehouse, on the ground that he had a lien on it for the freight.

[1] We considered somewhat at length, on page 125, the nature of the ship-owner's lien on freight, and saw that the tendency of both the common law and admiralty courts was to treat the lien as a common law lien depending entirely on possession. In a late case before Mr. Justice *Sprague*, decided since our former consideration of this question was in press, the question came up whether the lien was lost by delivery of the goods, it being contended that as the lien was maritime, it did not in any degree depend on possession; but the learned judge held, that, although the lien for freight was a maritime lien, yet the ship-owner could not proceed against the goods *in rem* after the master had delivered them, although they had not been sold. Sears *v.* Certain Bags of Linseed,

What is the meaning of the contract in this respect should always be determined by the words and circumstances of each case.[1] An admiralty court would have full equity powers,

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U. S. D. C. Mass., 1858. An appeal was taken, and the case argued before Mr. Justice *Clifford*, in June, 1858, but it is not yet decided. This case suggests to us what may be the true way of reconciling the decisions with the unquestioned principle that the lien of the ship on the goods should be reciprocal with that of the goods on the ship. The lien on the goods may be a maritime lien and yet be lost by delivery. Even the most favored lien, that of a seaman for his wages, is lost by a delay to enforce it; and a lien may be waived as we have seen in the preceding note; and it may well be a presumption of law that the act of the master in delivering up the goods is to be considered as a waiver of his lien. But if it be a maritime lien, which it certainly is in our judgment, we should say that if the circumstances attending the delivery were such as to show no intent on the part of the master to relinquish his lien, he should still have it, though the burden would be on him to show this fact.

The Supreme Court of the United States have, in an indirect manner, considered the lien on the goods as maritime. In Cutler *v.* Rae, 7 How. 729, they held that they had no jurisdiction *in personam* in general average, on the ground that the lien of the ship on the goods was a common law lien, and that they had no jurisdiction *in personam* except where they had a maritime lien. In New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. 344, they held that they had jurisdiction in contracts of affreightment as well *in personam* as *in rem*. It would therefore follow that the lien is maritime, although the decision did not proceed on this ground.

The true nature of a maritime lien was ably set forth in Harmer *v.* Bell, 7 Moore, P. C. 267, 22 Eng. L. & Eq. 62, and although the language used by the court is not altogether applicable to the case where the party claiming the lien has relinquished the possession of the *rem*, still we will state the case and cite a portion of the decision of the court as it sets forth the general doctrine of maritime liens in an admirable and lucid manner. The suit was *in rem* for damages done by a collision. The court said: "A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien, where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possessions. . . . . A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where the proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process." See also, The Betsey & Rhoda, Daveis, 112, and articles on the "Peculiarities of Maritime Liens," 15 Law Reporter, 555, London Law Magazine, Nov. 1852; 16 Law Reporter, 1, London Law Magazine, Feb. 1853, Vol. XVIII. N. S. 143.

[1] In Ruggles *v.* Bucknor, 1 Paine, C. C. 358, Mr. Justice *Thompson* says: "Each case must depend in a great measure upon its own circumstances. Parties are not bound to any fixed and precise stipulations to be embraced in a charter-party. They can insert any covenants they please, to answer the end and effect the object they have in view." See also, Gracie *v.* Palmer, 8 Wheat. 605, 634; Raymond *v.* Tyson, 17 How. 53. And in a doubtful case the law will lean towards that construction which

and its own process *in rem*, in a case involving questions of this kind; and would doubtless pay some regard to the principles of maritime law. We shall recur to this question again in our chapter on the law of admiralty. It has been held that the parties may agree that the lien shall continue, notwithstanding delivery. And the lien is not lost if the master is induced to surrender the possession of the goods by fraud or trick, and replevin may be maintained.[1] And if the goods are in the possession of the master, and are replevied, the lien is not waived by suing the owners of the goods and attaching other property.[2]

It may be added, that a third person, wrongfully in possession of goods, cannot detain them from the consignee or actual owner, on the ground that he has not paid the freight due upon them.[3] The bill of lading may contain, besides the usual contract for the transportation of the goods, stipulations in regard to the disposal of them or their proceeds.[4]

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favors the right of lien. Thus Mr. Justice *Ware*, in Drinkwater *v.* The Brig Spartan, Ware, 149, 158, speaks of it as a lien strongly favored by the law. Mr. Justice *Story* also, in Certain Logs of Mahogany, 2 Sumner, 589, says it ought not to be displaced without a clear and determinate abandonment of it. See also, Clarkson *v.* Edes, 4 Cow. 470. In Howard *v.* Macondray, Sup. Jud. Ct. Mass., Nov. T. 1856, the vessel was chartered for fifteen months with privilege to the charterers to continue the time to thirty months, at the rate of two thousand dollars a month to be paid to the owners, in New York, semiannually, the balance of the charter to be paid on the discharge of the cargo at the final port of delivery. The first payment was duly made, but before the second was due the charterers failed, and it was agreed to cancel the charter-party on payment of a draft drawn upon the agent of the charterers in San Francisco. The draft was protested, but the court were of the opinion on all the facts in the case that it was the intention of the parties to cancel the charter-party at all events, and that the owner had a lien on the goods transported at San Francisco, which was considered under the new agreement as the final port of delivery.

[1] Bigelow *v.* Heaton, 6 Hill, 43, 4 Denio, 496. It was, however, expressly held, in this case, that the intention of the master in parting with the goods was not to be considered, unless there was an express agreement that the lien should continue.

[2] Barnard *v.* Wheeler, 24 Maine, 412.

[3] Walley *v.* Montgomery, 3 East, 585.

[4] In Wallis *v.* Cook, 10 Mass. 510, it was agreed in the bill of lading that the net proceeds of the goods shipped, after deducting commissions and freight, should be paid to the shipper ninety days after the arrival of the vessel at her port of discharge in the United States. On the return voyage the ship, bound to New York, was stranded in Long Island Sound, and the cargo damaged and abandoned to the underwriters, but the ship was afterwards got off and repaired. The adventure of the plaintiffs was insured for the round voyage. No effects were shipped on board the vessel on her return voyage on account of the plaintiffs, but the defendant had invested the proceeds of the

It is often said that the contract for freight is an entire contract.[1] It is so in many respects; but the rule is not without some exceptions and modifications. This rule of entirety operates, first, on the quantity of the goods, no freight being payable unless all are delivered;[2] next, upon the completion of the voyage, the general rule being that no freight is payable unless the whole voyage is performed.[3]

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outward adventure in the cargo on his own account. The court held that the contract was in effect a loan on the personal responsibility of the defendant and his principals, to be repaid if the ship arrived at her port of discharge, and that, as she might, after being repaired, have gone there, the defendant was liable. See also, Winchester *v.* Patterson, 17 Mass. 62.

In Steamboat John Owen *v.* Johnson, 2 Ohio State, 142, where there was a stipulation in the bill of lading to deliver the goods to the consignee on payment of a certain sum to the clerk of the boat for the consignor, and the goods were delivered without payment, it was held that the boat was liable.

In Jones *v.* Hoyt, 23 Conn. 157, the bill of lading contained a stipulation that the lumber on board should be measured on the deck of the vessel on arrival at the port of destination, by the consignee and master, and freight should be paid according to such measurement. On arrival, the consignee having died, no person appeared to assist the captain in measuring the lumber, and it was accordingly put on the wharf and measured. Held, that the measuring on deck was not a condition precedent, and that the owner of the vessel, having substantially complied with the stipulations in the bill of lading, was entitled to freight.

[1] The Nathaniel Hooper, 3 Sumner, 542; Post *v.* Robertson, 1 Johns. 24, per *Thompson*, J.; Halwerson *v.* Cole, 1 Speers, 321; Adams *v.* Haught, 14 Texas, 243.

[2] See post, p. 149, n. 4.

[3] In The Nathaniel Hooper, 3 Sumner, 542, 554, Mr. Justice *Story* said: "The general principle of the maritime law certainly is that the contract for the conveyance of merchandise on a voyage is, in its nature, an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due; for a partial conveyance is not within the terms or the intent of the contract, and unless it be completely performed by the delivery of the goods at the place of destination, no freight whatsoever is due, and the merchant may well say *non in hæc fœdera veni*." Lord *Ellenborough* also, in Hunter *v.* Prinsep, 10 East, 378, 394, states the rule with great accuracy. He says: "The ship-owners undertake that they will carry the goods to the place of destination unless prevented by the dangers of the seas, or other unavoidable casualties; and the freighter undertakes that if the goods be delivered at the place of their destination, he will pay the stipulated freight; but it was only in that event, namely, of their delivery at the place of destination, that he, the freighter, engages to pay any thing. If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship-owner will not forward them, the freighter is entitled to them without paying any thing. One party, therefore, if he forward them, or be prevented, or discharged from so doing, is entitled

SECTION III.

OF THE DELIVERY OF THE GOODS.

If freight is payable by the ton, or bale, or package, or barrel, severally, or where different parts of the cargo are shipped upon distinct and separate terms as to freight, the consignee must pay for what is delivered.[1] If an entire freight is payable for an entire cargo, and a part is delivered and accepted, the freight of that part must be paid.[2] But the consignee may refuse to receive the part offered to him, and then the consignor is not bound to pay a *pro rata* freight.[3] Where what is shipped increases on the voyage, it has been held that freight is

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to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all."

In Mackrell *v.* Simond, 2 Chitty, 666, 673, Lord *Mansfield* says: "The safety of the ship is the mother of freight." And Mr. Justice *Maule*, in Crozier *v.* Smith, 1 Man. & G. 407, 415, says: "Freight is generally payable only on the arrival of the vessel, when the merchant receives the goods on which it is charged." See also, Osgood *v.* Groning, 2 Camp. 466; Barker *v.* Cheriot, 2 Johns. 352; Armroyd *v.* Union Ins. Co. 3 Binn. 437; Union Ins. Co. *v.* Lenox, 1 Johns. Cas. 377, 383; Sampayo *v.* Salter, 1 Mason, 43; Caze *v.* Baltimore Ins. Co. 7 Cranch, 358; Vlierboom *v.* Chapman, 13 M. & W. 230.

[1] Christy *v.* Row, 1 Taunt. 300; Ritchie *v.* Atkinson, 10 East, 295. See also, M'Gaw *v.* Ocean Ins. Co. 23 Pick. 405, 414; Frith *v.* Barker, 2 Johns. 327.

[2] Hinsdell *v.* Weed, 5 Denio, 172.

[3] Sayward *v.* Stevens, 3 Gray, 97. In this case the owners of the vessel agreed to transport for a gross sum, a number of miscellaneous goods, which bore no proportion to each other in size or in cost of transportation. Part were lost on the voyage, and the consignee refused to accept the residue. The court held that the contract being entire, the consignor was not liable to pay either an entire or a *pro rata* freight. The goods which arrived were sold by the captain, as no one appeared to claim them. After the decision in 3 Gray, 97, the owner of the goods brought an action for money had and received, to recover the proceeds. The defendants claimed to deduct the freight due for the goods, on the ground that the action for money had and received was an affirmance of the contract. But the court held that freight should not be deducted. But, as when the goods were sold there was supposed to be more than there actually was, and the agent of the owner of the ship repaid to the purchaser the sum of seventy-five dollars, the court held that this should be deducted. Stevens *v.* Sayward, Sup. Jud. Ct. Mass. March Term, 1857.

due only for what is *shipped*.[1] If the owner delivers a part of the goods and pays for the rest, he is entitled to his freight on the whole, provided the consignee receives the part delivered.[2] If the goods are accepted and freight is demanded, the shipper may have his claim against the ship-owner, by way of offset or otherwise, for the value of the goods not delivered.[3] And the ship-owner must indemnify the shipper for their full value, or for the injury they have sustained, unless he can show that they were lost or injured from a cause for which he is not responsible; and the burden of proof is on the ship-owner to show that the loss was occasioned by such a peril.[4] But if this is clearly

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[1] In a recent case in the Court of Exchequer in England, 2,664 quarters of corn were shipped on board a vessel to be carried from Odessa to Gloucester. The bills of lading were in the usual form, with the clause "quantity and quality unknown," freight payable at a certain rate per quarter On the arrival of the vessel, a portion of the corn having become heated and damaged, the bulk was found to have increased to 2,785½ quarters. The court held that freight was payable for the quantity *shipped*, and not for that *delivered*. Gibson *v.* Sturge, 10 Exch. 622, 29 Eng. L. & Eq. 460.

[2] Hammond *v.* McClures, 1 Bay, 101.

[3] Edwards *v.* Todd, 1 Scam. 462. See also cases cited *post*, ch. 7, § 4, n.

[4] "After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show, that it was occasioned by one of the perils from which they were exempted by the bill of lading." Per *Nelson*, J., in Clark *v.* Barnwell, 12 How. 272, 280. See also, Forward *v.* Pittard, 1 T. R. 27; Riley *v.* Horne, 5 Bing. 217; Hastings *v.* Pepper, 11 Pick. 41; Colt *v.* M'Mechen, 6 Johns. 160; The Huntress, Daveis, 82; Bell *v.* Reed, 4 Binn. 127; Clark *v.* Spence, 10 Watts, 335; Murphy *v.* Staton, 3 Munf. 239; Ewart *v.* Street, 2 Bailey, 157; Smyrl *v.* Niolon, Id. 421; King *v.* Shepherd, 3 Story, 349; Turney *v.* Wilson, 7 Yerg. 340; Whitesides *v.* Russell, 8 Watts & S. 44; Dunseth *v.* Wade, 2 Scam. 285; Atwood *v.* Reliance Transp. Co. 9 Watts, 87; McIntosh *v.* Gastenhofer, 2 Rob. La. 403; Price *v.* Ship Uriel, 10 La. Ann. 413; Whitney *v.* Gauche, 11 La. Ann. 432; Ship Rappahannock *v.* Woodruff, 11 La. Ann. 698; Grieff *v.* Switzer, 11 La. Ann. 324; Bissell *v.* Price, 16 Ill. 408; Alden *v.* Pearson, 3 Gray, 342, 348; Graham *v.* Davis, 4 Ohio State, 362. In the case of Baker *v.* Brinson, 9 Rich. 201, the bill of lading contained the clause, "rust and breakage are excepted." The articles transported were stoves, one of which was found to be broken on arrival. Held, that the exception included only such breakage as care and diligence could not avoid, and that the burden was on the carrier to show that there had been no negligence on his part. In the case of The Ship Martha, Olcott, Adm. 140, a quantity of sheet iron was found on delivery to be stained and rusted by wet. It was proved that the iron was well stowed, that the ship came in tight and dry, that the iron was taken on board in dry weather, and not exposed to the access of water. But the court held that this was not enough, for the burden was on the ship to show that the damage existed when the cargo was laden on board. See also, Zerega *v.* Poppe, Abbott, Adm. 397. But in Merriman *v.* Brig May Queen, 1 Newb. Adm. 464, the court was of the opinion that a special contract in the bill of

shown to be the case, then the shipper is bound to show that the loss could have been prevented by the exercise of reasonable care and skill on the part of the carrier.[1] And if he pays to the shipper the full value of the goods, he may deduct from it the freight which would have been payable to him, as otherwise the shipper would be more than indemnified.[2]

But the question of the entirety of the contract arises far more frequently when the goods are not delivered at the end of the voyage, or, in other words, when the whole of the voyage is not completed.[3] We have already seen that the ship-owner has a lien on the goods for his freight; that is, he may retain them until the freight be paid; but if he retain them he can bring no action for payment of the freight. For the rule is this: there can be no action for freight unless delivery is either made, or prevented from being made, by the act or fault of the shipper or consignee.[4] It has been held, however, that if the goods are

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lading in relation to breakage, would, if valid in other respects, throw the burden of proof on the shipper.

[1] It was said in Clark *v.* Barnwell, 12 How. 272, 280, that if the ship-owner can prove that the loss was occasioned by a peril excepted against, the shipper may still show that the loss might have been avoided by the exercise of reasonable skill and attention on the part of the carrier, but in such a case the burden of proving this would be on the shipper. And this was so decided in Hunt *v.* Propeller Cleveland, 1 Newb. Adm. 221, 6 McLean, C. C. 76.

[2] Roccus, note 81, cited by Ld. *Mansfield* in Luke *v.* Lyde, 2 Burr. 882, 889; Knox *v.* The Ninetta, Crabbe, 534, 544; Arthur *v.* Schooner Cassius, 2 Story, 81. It was held in the case of Ship Panama, Olcott, Adm. 343, 363, that where freight was paid in advance, and the goods were not delivered, the owner had a lien on the ship for the freight, and the value of the goods. But this is certainly inconsistent with the cases above cited, and with the subsequent case, decided by the same learned judge, of Thatcher *v.* McCulloh, Olcott, Adm. 365. See also, The Joshua Barker, Abbott, Adm. 215; Bazin *v.* Richardson, U. S. C. C. Penn. Dist. 1857, 20 Law Reporter, 129, 5 Am. Law Reg. 459.

[3] See ante, p. 148, note 3.

[4] In Bradstreet *v.* Baldwin, 11 Mass. 229, the cargo was seized by the government for the default of the shipper. The court held, that, "if there was evidence of a readiness on the part of the plaintiffs to deliver the cargo to the defendant, and the actual delivery and discharge of it had been prevented by the neglect of the defendant to receive it; or if the delivery was intercepted by an attachment, or seizure for a default of the defendant, the plaintiffs would be as well entitled upon this evidence, as they would be on proving an actual discharge and delivery of the cargo." In Clendaniel *v.* Tuckerman, 17 Barb. 184, the vessel arrived at her port of destination, and offered to deliver her cargo. The consignee was not ready to receive it. The vessel waited several days, and during the delay was capsized without any fault on the part of the

tendered to the consignee at the proper end of the voyage, and the consignee is unable to receive them by reason of the action or prohibition of government, the whole freight is still earned and due; for here, the ship-owner has done all that he was bound to do.[1] Not so, however, if the ship is prevented from arriving at the port by a blockade, or any similar cause, for then the voyage is not finished in fact, nor can it be certain that it would have been finished and delivery made had there been no obstruction of this kind.[2] A usage to receive goods at the quarantine ground is admissible as showing a compliance with the engagement to deliver at the port.[3] When a cargo is shipped to a foreign country and no particular port of delivery is mentioned, the presumption is that the general port of delivery of such cargoes in that country is the one meant.[4]

The general rule applicable to carriers and other persons contracting to deliver goods, is that a personal delivery is necessary.[5] But this rule does not apply to the case of ships, the usages of

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master and crew, and part of the coal was lost. Held, that full freight was earned. See also, Brown *v.* Ralston, 9 Leigh, 532.

[1] Morgan *v.* Ins. Co. of North America, 4 Dall. 455; Bradstreet *v.* Heron, Abbott, Adm. 209. It has also been held that where the delivery of the goods is prevented by their wrongful seizure by custom-house officers, the ship-owners will not be excused, nor their contract with the shippers dissolved. Gosling *v.* Higgins, 1 Camp. 451; Spence *v.* Chodwick, 10 Q. B. 517. See also, Evans *v.* Hutton, 4 Man. & G. 954. In Brooks *v.* Minturn, 1 Cal. 481, it was held that if a seizure by the revenue officers was illegal, full freight would be due, so if legal and occasioned by the fault of the consignee, but if caused by the fault of the ship-owner or his agents, though full freight would be due, if the goods were finally delivered, the consignee might deduct any damages which he had suffered by the detention.

[2] Hadley *v.* Clarke, 8 T. R. 259; Stoughton *v.* Rappalo, 3 S. & R. 559; Scott *v.* Libby, 2 Johns. 336; Lorillard *v.* Palmer, 15 Johns. 14, 20; Palmer *v.* Lorillard, 16 Johns. 348; Burrill *v.* Cleeman, 17 Johns. 72; Richardson *v.* Maine Ins. Co. 6 Mass. 102; Baylies *v.* Fettyplace, 7 Mass. 325. In Sims *v.* Howard, 40 Maine, 276, goods were shipped from Philadelphia to Bangor. The bill of lading provided that if the river should be closed with ice, the cargo should be received at Frankfort, or as near as the ice would permit. On arrival at F. the river was full of ice, and the captain refused to go further, but the vessel was taken to B. by the owners of part of the cargo, and as soon as this with a part of the goods in question was landed, the vessel was towed back to prevent her being frozen in. The rest of the goods were discharged and stored at F. Held, that freight was due.

[3] Bradstreet *v.* Heron, Abbott, Adm. 209.

[4] Smith *v.* Davenport, 34 Maine, 520.

[5] And in Wardell *v.* Mourillyan, 2 Esp. 693, it was held that a delivery of goods by a hoyman on the wharf to which he usually plied was not sufficient.

trade having constituted a delivery on the wharf with notice to the consignee sufficient.[1] The delivery must be on a wharf which is suitable for the cargo which is to be placed upon it; if then the goods are injured in consequence of the insufficiency of the wharf, the vessel is liable as if no delivery had taken place.[2] And although the liability of the carrier may cease by the goods being put on the wharf, yet if they are taken on board again his liability revives.[3]

The goods must not be piled on the wharf promiscuously with those of other consignees, but the master must, as far as possible, separate the different consignments, so as to render them accessible to their respective owners.[4] In all cases the master is required to give notice to the consignee of the arrival of the vessel, and of his readiness to discharge the cargo;[5] and knowl-

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[1] In Hyde *v.* Trent & Mersey Nav. Co. 5 T. R. 389, which was a case of carriage by land, *Buller*, J., said: "When goods are brought here from foreign countries, they are brought under a bill of lading, which is merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land, and according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier." The former part of this reason does not appear to be perfectly satisfactory, because a bill of lading is not merely "an undertaking to carry from port to port," but it is also a contract to deliver the goods to a specified person. The general question of delivery was much discussed in the case of Cope *v.* Cordova, 1 Rawle, 203, and the usages and customs of several foreign ports in relation thereto set forth at length. In this case the plaintiff was the consignee of ten crates of merchandise. As soon as the vessel was ready to unload, he sent a porter to receive them, with a permit and a list of the articles, and with authority to receive them, etc. On the twenty-second of the month one or more crates were delivered to the porter, and one or more on the two following days. The porter did not attend during the whole of these days, but called repeatedly every day, and took away such as were delivered. One of the crates was landed on the twenty-third, but was not received by the porter, and it was not known what had become of it. It was held that the defendant was not liable.

[2] The Bark Majestic, U. S. Dist. Ct., New York, 10 Legal Observer, 100. In this case a cargo of iron was unloaded on a spile dock, the master having notice that it was not strong enough to sustain it, and the vessel was held liable for the injury sustained by the wharf breaking through.

[3] The Huntress, Davcis, 82.

[4] The Ship Middlesex, U. S. C. C. Mass. Dist., May T. 1857, 21 Law Reporter, 14.

[5] This doctrine is laid down in the early case of Golden *v.* Manning, 3 Wilson, 429, 2 Wm. Bl. 916, as follows: "There can be no doubt but carriers are obliged to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods be delivered to the right person." See also, The Peytona, Ware, 2d ed. 541, 2 Curtis, C. C. 21; Salmon Falls

edge, therefore, casually acquired that the vessel has arrived and will discharge her cargo at a particular wharf, is not enough.[1] Generally, if a notice in the newspaper is relied on, it must be shown that the consignee read the notice.[2] If, however, the consignee is absent or cannot be found after diligent search, the want of notice is excused.[3] If the master has wrongfully omitted to sign a bill of lading, and has sailed without learning the names of the consignees, he cannot avail himself of his ignorance as an excuse for not giving notice of the landing of the goods.[4] But if it is the fault of the shipper that there is no bill of lading, notice published in a paper taken by the consignees is sufficient.[5] And it is the duty of the master, if no

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Manufacturing Co. *v.* Bark Tangier, U. S. C. C. Mass. Dist., May T. 1857, 21 Law Reporter, 6; The Ship Middlesex, 21 Law Reporter, 14; Ostrander *v.* Brown, 15 Johns. 39; Price *v.* Powell, 3 Comst. 322; House *v.* Schooner Lexington, 2 N. Y. Leg. Obs. 4; Gatliffe *v.* Bourne, 4 Bing. N. C. 314, 5 Scott, 667, Arnold, 120, affirmed in the Exchequer Chamber, 3 Man. & G. 643, 3 Scott, N. R. 1, and in the House of Lords, 7 Man. & G. 850. In Barclay *v.* Clyde, 2 E. D. Smith, 95, goods were shipped from New York to Philadelphia. On arrival the carrier sent them by a cartman to the store of the consignee. When they reached the store they were found to be damaged, but it did not appear whether it was caused by the cartman or whether it happened on board the ship. It was held that the carrier's liability continued till the goods were delivered, and that the delivery on the wharf was not sufficient, as no notice had been given to the consignee.

[1] The Ship Middlesex, 21 Law Reporter, 14.

[2] Kohn *v.* Packard, 3 La. 224. In Northern *v.* Williams, 6 La. Ann. 578, no direct notice was given, but the answer did not set up want of it, and the court were of opinion that the consignee received the bills of lading, and saw the notice of the arrival in the papers, though there does not appear to have been any proof of this last fact.

[3] Fisk *v.* Newton, 1 Denio, 45. The consignee was a clerk in New York, having no place of business of his own, and his name was not in the directory. The agent of the carriers made diligent inquiry for him, but could not find him. He then placed the goods in the hands of storehouse keepers, who were then in good credit, and they gave a receipt for the same. After some months the consignee appeared, demanded the goods, and paid the freight on the receipt being given up to him. But as the storehouse keepers had failed, he sought to recover from the carriers. Held, that they were not liable. Mr. Justice *Jewett* said: "When goods are safely conveyed to the *place* of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business at the place of delivery, for and on account of the owner. When so delivered, the storehouse keeper becomes the bailee and agent of the owner in respect to such goods." See also, Mayell *v.* Potter, 2 Johns. Cas. 371.

[4] The Peytona, Ware, 2d ed. 541, 2 Curtis, C. C. 21.

[5] Medley *v.* Hughes, 11 La. Ann. 211. And probably notice in any paper would, in such a case, discharge the vessel.

consignee is named in the bill of lading, to store the goods for the benefit of the owner.[1] And this is his duty generally, when the consignee refuses to receive the goods; and after the goods are on the wharf the consignee has a reasonable time, in which to inspect them, and determine whether or not he will accept the consignment. Till he does accept, he is not liable for freight. If he refuses to accept he incurs no liability, and the master cannot leave the goods to perish, but is bound to store them for the owner.[2] The delivery must be on a proper day as regards the weather, and must also be on a business day,[3] and at a proper hour of such day; and a clerk or truckman in the employment of the consignees has no authority to bind the latter to receive the goods at an unusual time;[4] and the liability of the vessel continues till the consignee has had that reasonable time to examine the goods to determine whether he will accept them or not as spoken of above. In general, the delivery must be *reasonable*, in time, place, and circumstance.[5]

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[1] Galloway *v.* Hughes, 1 Bailey, 553.

[2] Arthur *v.* Schooner Cassius, 2 Story, 81; Ostrander *v.* Brown, 15 Johns. 39; Chickering *v.* Fowler, 4 Pick. 371. In this last case the action was brought on the bill of lading by the consignor. The consignee refused to accept the goods, and the master took no further care of them, and they accordingly perished. The court held, that if the consignee ordered the goods unconditionally, he was bound to accept them, and then the master would not be liable; but if not, the master should have stored them for the owner.

[3] Salmon Falls Co. *v.* Bark Tangier, 21 Law Reporter, 6. It was held, in this case, that a delivery on Fast day was not good, there being evidence that for more than thirty years Fast day had not been considered a day of delivery. See also, Goddard *v.* Bark Tangier; Pearson *v.* Same, 21 Law Reporter, 12.

[4] Goddard *v.* Bark Tangier, 21 Law Reporter, 12.

[5] Price *v.* Powell, 3 Comst. 322, which was an action brought by the consignor, it was held, that the liability of the carrier continued till the consignee had had a reasonable time, in which to take away the goods. Notice was given late in the evening, and it was held that the consignee was not obliged to take away the goods before the next day, and that if they were injured in the night while on the wharf, the carrier was liable. So, in Segura *v.* Reed, 3 La. Ann. 695, which was also an action by the consignor. After the delivery on the levee, and notice to the consignees, some of the goods were stolen. The court said: "The contract of the vessel is to deliver the goods to the consignee, and the responsibility continues until there is an actual delivery, or some act which is equivalent to, or a substitute for it. Even assuming the general rule to be, that putting the goods on the wharf discharges the vessel, where there has been a notice to the consignees of the time and place of the delivery, it seems to us that this rule is not to be applied with such rigor against the consignee as to put the goods unqualifiedly at his risk from the very instant of landing them, when he has

It has been held, that a usage to deliver goods without notice may be shown.[1] But a usage for a wharfinger to accept goods on behalf of the consignees, is not one which will be considered binding.[2] And, whatever the law may be in regard to a usage, it is clear that the parties may make a special contract in regard to the manner of delivery.[3] The goods should be plainly marked, so that the consignee may be known; and if, without any fault on the part of the carrier, the owner sustains a loss in

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made repeated calls for them during the day, and the discharge is not made until an advanced hour of the day." The consignee in this case received notice between twelve and one o'clock on Saturday, and went himself, and sent his clerk at three to receive the cotton. It was not then delivered, and nothing was said in regard to the time when it would be delivered. It was put on the levee at four o'clock on that day. On Monday ten bales were missing. The carrier was held liable. See also, Northern *v.* Williams, 6 La. Ann. 578.

[1] Gibson *v.* Culver, 17 Wend. 305; Farmers and Mechanics Bank *v.* Champlain Transp. Co. 16 Vt. 52, 18 id. 131, 23 id. 186. But see Price *v.* Powell, 3 Comst. 322. In Steamboat Albatross *v.* Wayne, 16 Ohio, 513, a local usage regulating the mode of delivering goods at Memphis, was held not to be binding on shippers of goods from Cincinnati to that place, unless it was known to the merchants and shippers there generally. This was so held, on the ground that a practice which is unknown to those generally engaged in the trade, cannot be sustained as a usage, and cannot control the terms of a contract, because the parties to it cannot be presumed to have contracted with reference to the usage.

[2] The Ship Middlesex, 21 Law Reporter, 14. So in Harkness *v.* Church, 10 La. Ann. 64, it was held that a delivery by a carrier to a wharf-boat at the port of destination, without notice to the consignee, was not sufficient. But that, if the consignee paid the freight to the owner of the wharf-boat, which he had advanced, this would amount to a recognition of the authority of the wharf-boatman to receive the goods as the agent of the consignee. See also, Wayne *v.* Steamboat General Pike, 16 Ohio, 421; Steamboat Albatross *v.* Wayne, id. 513.

[3] In the case of The Grafton, Olcott, Adm. 43, 1 Blatchf. C. C. 173, two hundred and sixty-seven bales of hemp were shipped from New Orleans to New York. Notice of the arrival was given, but the consignees, who were also the owners of the goods, refused to receive them on account of the weather, which they alleged was not suitable for the discharge of the cargo. The evidence showed that the day was one of good working weather after nine, A.M.; that there were clear indications of rain about noon, and that the storm, which damaged the goods in the afternoon, came on abruptly, with but few minutes previous warning. Notwithstanding the refusal of the consignees to receive the goods, the ship began to unload them; but at a little before noon, an agreement was entered into between the consignees and the agents of the vessel, that the latter should cease to unload, if the consignees would take away what was already unloaded. The consignees took away a number of bales, but the ship continued to unload, and in the afternoon the bales on the wharf, and some of those which were taken away, but not stored, were damaged by rain. There was evidence that the number taken away was greater than that on the wharf at twelve, though the number stored was less. The court held, that though generally a delivery on the wharf with notice

consequence of the illegible direction, the carrier is not liable. But if the goods have been delivered to the owner and the freight paid, and the carrier afterwards takes them back without the knowledge of the owner, and delivers them to a third person who claims them, it is no defence to an action for the goods that they were not distinctly marked, although the carrier acted in good faith.[1]

In Pennsylvania it seems to be supposed that a delivery of goods at a foreign port differs from a delivery in the internal or coasting trade.[2] But this distinction does not appear to us to be warranted by law to the extent contended for. If the goods are to be transported over different parts of their route by carriers having no connection with each other, a notice by one carrier to another that the goods have arrived, and that he is ready to deliver them, is sufficient to exonerate him.[3]

A question of some difficulty has arisen, whether the contract of the ship-owner or master is so far an entirety that their liability continues till the whole consignment is out of the ship and ready for delivery. On the whole, we should say, that, if the consignee was notified that a part was ready for delivery, he would be obliged to take that part, and could not recover if, before all the goods were out, some were burned or otherwise destroyed or injured, on the wharf.[4]

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was a delivery to the consignees, yet that the special agreement ought to have been carried out, and that all the bales taken away from the wharf, whatever their number, were to be considered as accepted by the consignees, but that they might recover for the damage done to the rest.

[1] The Huntress, Daveis, 82.

[2] See Cope *v.* Cordova, 1 Rawle, 203. The case of Hemphill *v.* Chenie, 6 W. & S. 62, was decided on this ground. It was there held, that the responsibility of a carrier on the Ohio does not cease upon the delivery of the goods on a wharf, and notice to the consignee. But when we look at the facts of this case we shall see that it differs in no respect from the well-settled rule of law applicable to contracts of affreightment generally. See ante, p. 155, n. 2. The action was brought by the consignor, and not by the consignee. The carrier put the goods on the wharf, gave notice to the consignee, and took no further care of them. The goods were probably stolen, and the carrier was held liable.

[3] Goold *v.* Chapin, 10 Barb. 612.

[4] The question came before Mr. Justice *Sprague*, in a late case, Paine *v.* Bowker, U. S. D. C., Mass. 1856. Three hundred and forty-nine barrels of flour were consigned to a firm in Boston. On the twenty-sixth of the month the consignees were notified that the ship would unload that day, and the greater portion of the flour was landed on the

The goods must be delivered at the port of destination, and therefore the vessel is not discharged by showing that the goods were delivered at an intermediate port, and were to be shipped from thence to the port of destination under a contract made by the defendant with another boat.[1]

By the custom of the river Thames the master of a vessel is bound to guard goods loaded into a lighter, sent for them by the consignee, until the loading is complete, and he cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them.[2]

SECTION IV.

OF THE FORWARDING OF THE GOODS IN OTHER VESSELS.

As the ship-owner has thus no claim for freight until the whole voyage is completed, he has no lien on the cargo for *payment* of freight until then; but in the mean time he has a lien on the cargo for the *earning* of freight. That is, he has a right to hold a cargo once shipped on board his vessel, and to carry it to its destination, although circumstances may occur which will cause

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wharf. The next morning twelve more barrels were landed. In the afternoon every thing on the wharf was destroyed by fire. All the flour, with the exception of three barrels, which were afterwards tendered to the consignee, but not accepted, was on the wharf at the time of the fire. It was contended that the consignee was not bound to take away any of the barrels till the whole was delivered, but the court decided otherwise, and held, that the ship had earned her freight. See also, Vol. II. in regard to the liability of insurers where part of the cargo is on the wharf and destroyed before the whole is landed.

[1] Watts v. Steamboat Saxon, 11 La. Ann. 43.

[2] Catley *v.* Wintringham, Peake, 150; see p. 177, n. 1. In Abbott on Shipping, 379, it is stated that it has been much contested whether the master is, by the usage, bound to take care of the lighter, after it is fully laden, until the time when it can properly be removed from the ship to the wharf. And that, at a trial of this question, it was held, that the master was not obliged to, citing Robinson *v.* Turpin, before Lord *Ellenborough*, C. J. But the action in this case was against the lighterman, and the plaintiff recovered. At a former trial the plaintiff had been nonsuited. Whether this former trial was against the master, is not stated, though it is to be inferred that it was.

great delay, and perhaps great diminution of value.[1] It would seem from the cases, that the shipper may at any time reclaim his goods by paying full freight, especially if he adds compensation for damage, trouble, etc.; for the lien, or hold, of the ship-owner upon them is only for this purpose;[2] but, unless he

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[1] See ante, p. 128, n. 1; also Tindal *v.* Taylor, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210; Clemson *v.* Davidson, 5 Binn. 392; M'Gaw *v.* Ocean Ins. Co. 23 Pick. 405, 410; Lord *v.* Neptune Ins. Co. Sup. Jud. Ct. Mass. Nov. T. 1857. The case of Small *v.* Moates, 9 Bing. 574, also turned upon this point. The court there held that where a charterer bought goods, and placed them on board the vessel, the lien of the ship-owner immediately attached, and that if the charterer sold them, before the vessel sailed, to a third party, and gave him bills of lading in the usual form, at the end of the voyage, the vendee would not be entitled to them on payment of freight, but the ship-owner would have a lien on them for the whole freight due under the charter-party. See also ch. 8, § 2, and next note *infra*.

[2] It is well settled that the master has a right, after the goods are shipped on board, to carry them to their port of destination and thus earn his full freight. Having this right, it has been determined that, at an intermediate port, the master may, if the shipper wishes his goods, give them up to him, and demand his full freight, or, if this is not paid, he may carry them on, and thus earn it. This grows out of the entirety of the contract. It is however another question, and one it seems to us susceptible of argument, whether the master is *obliged*, at the intermediate port, to give up the goods on the tender of full freight. There can be no question as to his *power* to deliver them up; but we are now considering whether he is so far bound to do this, that in default thereof he will be liable as a wrongdoer. It seems, however, to have been taken for granted by the majority of the authorities, that he has no option in the case; but the point has never been directly adjudicated upon, though it is referred to incidentally in numerous cases. Thus, Chancellor *Kent*, in Palmer *v.* Lorillard, 16 Johns. 348, 355, speaking of the contract of affreightment, said: "It is well understood in the English law, and in our own, that it is not in the power of one only of the parties to rescind a contract. Being mutually binding it requires mutual consent to dissolve it. The one party had no right to tender the cargo, nor the other to demand it, until the contract had been fulfilled, *unless, indeed, the demand was accompanied with the offer of the entire freight.* The one side had an interest in the conveyance of the goods, and the other in the payment of the freight, and the obligation to perform in the time and mode provided, was reciprocal." See also, Jordan *v.* Warren Ins. Co. 1 Story, 342, 354, per *Story*, J.; M'Gaw *v.* Ocean Ins. Co. 23 Pick. 405, 411, per *Shaw*, C. J.; Shipton *v.* Thornton, 9 A. & E. 314, per Ld. *Denman*, C. J.; Gibbs *v.* Gray, Exch. 1857, 40 Eng. L. & Eq. 531. In these cases the point did not arise, and the remarks are merely incidental, and are not therefore of so much authority as they would otherwise be. In the laws of Oleron, art. 4, it is stated that if the ship becomes disabled, the shippers may have the goods by paying a *pro rata* freight, *if the master pleases*. The article then says: "But if the master will, he may repair his ship, if he can do it speedily; and if not, he may hire another ship to complete the voyage." The 16th article of the Laws of Wisbuy, also, provides that "the merchants may take away their goods, paying the freight, *or satisfying the master*." The Ordinance of the Marine, liv. III. tit. III. du Fret. art. 11, provides merely that "if the master is obliged to repair his vessel during

chooses to do this, the ship-owner need not deliver them, although he is in port, damaged, and the cargo damaged and needing repair, which, with the necessary care of the cargo, will cost much time and money. Still the master or owner may say that he shall perform and finish the passage as soon as possible, and thereby earn all his freight.[1]

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the voyage, the shipper must wait, or pay the entire freight." It will thus be seen that by the early maritime laws, the consent of the master was requisite to a dissolution of the contract. The contract of affreightment is like any other contract, and cannot be dissolved at the will of one of the parties to it. It is that the goods shall be carried on the particular voyage for the agreed sum to be paid. If then, the master, for any reason, wishes to carry the goods on to the end of the voyage, it is difficult to see upon what principle of law he can be compelled to give them up. In Tindal *v.* Taylor, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210 (previously cited on p. 128, n. 1), the question arose, whether a shipper had a right to demand his goods after they were laden on board, but before the vessel sailed from her original port. The court held that, by the usage of trade, the merchant, if he demanded the goods in a reasonable time before the ship sailed, was entitled to have them delivered back to him on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them, but that these were conditions precedent, and if not performed, the original contract remained in force. The language of the court, however, shows that if this usage had not been proved, the shipper could not have demanded his goods, without the consent of the master, for they said: "The general rule is that a contract, once made, cannot be dissolved except with the consent of the contracting parties." And in Clark *v.* Mass. F. & M. Ins. Co. 2 Pick. 104, Mr. Justice *Putnam* said: "Neither party is at liberty to abandon the contract without the consent of the other, or without legal cause, which was not procured or occasioned by the fault of the party who relies upon it." And in The Nathaniel Hooper, 3 Sumner, 542, 559, Mr. Justice *Story* said: "Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unlivered, in order to make the repairs, or to insure its safety, or ascertain and repair the damage done to it; would such an unlivery dissolve the contract for the voyage? Certainly not." The Spanish Commercial Code of 1829 provides that the shipper may unload his goods on paying half freight, the expense of loading and unloading, and all damage to the other shippers. The latter to be at liberty to oppose the unloading, taking the goods upon themselves, and paying the invoice price. Código de Commercio, art. 765.

[1] In Jordan *v.* Warren Ins. Co. 1 Story, 342, insurance was effected on freight from New Orleans to Havre. Soon after sailing, the vessel met with a disaster, and was obliged to put back to New Orleans. The cargo was found to be so much damaged that it would have taken several months to have put it in a condition for reshipment, and it was sold by consent. Mr. Justice *Story* held, that the master had a right to wait till the goods were prepared for reshipment, and then to take them on to their port of destination, if they would arrive there in specie, and that not having done so, the underwriters were not liable. See also, Herbert *v.* Hallett, 3 Johns. Cas. 93; Griswold *v.* N. Y. Ins. Co. 1 Johns. 204; Saltus *v.* Ocean Ins. Co. 14 Johns. 138; Ellis *v.* Willard, 5 Seld. 529; Clark *v.* Mass. F. & M. Ins. Co. 2 Pick. 104; M'Gaw

Nor is this all; for he may send the cargo forward in another ship, or even by land conveyance to its destination, and then claim his whole freight.[1] And he not only may do so, but, according to strong authorities, is bound thus to transship the cargo, if there be a vessel or other means of transport, to the place whither the cargo should go, within reasonable reach.[2] He is not bound to transship at all events;[3] but this obligation

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v. Ocean Ins. Co. 23 Pick. 405; The Nathaniel Hooper, 3 Sumner, 542; Lord *v.* Neptune Ins. Co. Sup. Jud. Ct. Mass. Nov. T. 1857; Mordy *v.* Jones, 4 B. & C. 394; Hunter *v.* Prinsep, 10 East, 378, 394; Tronson *v.* Dent, 8 Moore, P. C. 419, 36 Eng. L. & Eq. 41; Tio *v.* Vance, 11 La. 199; Adams *v.* Haught, 14 Texas, 243.

[1] Luke *v.* Lyde, 2 Burr. 882, 889. See also cases in note *infra*. It is evident from the language of the court in the case of Rosetto *v.* Gurney, 11 C. B. 176, 183, 7 Eng. L. & Eq. 461, that if the master sends the goods on, he does it on the original contract, and is entitled to the freight stipulated for, although the expense of sending it on be less than by the original ship. And it was so determined in Shipton *v.* Thornton, 9 A. & E. 314.

[2] All the authorities agree that the master has the *power* to send the goods on in any other ship, if his own be lost, but it has been doubted whether it is his *duty* so to do. The question turns upon the nature of the contract made by the parties. It is admitted that the master is bound to take the goods on, if he can, in his own ship; but, it has been argued that this is all, and that if his own ship is destroyed by the *vis major*, the contract is thereby put an end to. The Rhodian Law (Dig. 14. 2. 10. 1.), the laws of Oleron, art. 4, and the laws of Wisbuy, art. 16, gave the master *power* to transship in such a case. Faber (Com. ad Pand.) and Vinnius (notæ ad Com. Peckii, ad Rem Nauticum, 294, 295) were of opinion that the master was not bound to transship. The Ordinance of the Marine, on the other hand, held it to be the *duty* of the master to send the goods on if he could. Tit. du Fret. art. 11. Valin (tit. du Fret. art. 11) and Pothier (Charte Partie, n. 68) hold, that the master is not obliged, and that he loses only his freight for the entire voyage by his omission to procure another vessel. Emerigon maintains the opposite, in support of the old code, tom. 1, 428, 429. By the new code, the master is obliged, if the vessel becomes disabled, to repair her, and during the time of such repairing the shipper is bound to wait, or pay the full freight, and if the vessel cannot be repaired he *must* hire another, but if he cannot, *pro rata* freight is due. Code de Commerce, art. 296. The subject is also elaborately discussed by Boulay-Paty, Cours de Droit Commercial Maritime, tom. ii. 398–405; and the views taken by Emerigon are adopted by him. Pardessus also is of the opinion that it is the duty of the master in such a case to procure another vessel. Cours de Droit Com. tome iii. n. 644. In England the point has not as yet been decided. See Shipton *v.* Thornton, 9 A. & E. 314; Rosetto *v.* Gurney, 11 C. B. 176, 188, 7 Eng. L. & Eq. 461. In this country the rule seems to be well settled in accordance with the doctrine of the text. Saltus *v.* Ocean Ins. Co. 12 Johns. 107; Schieffelin *v.* N. Y. Ins. Co. 9 Johns. 21; Searle *v.* Scovell, 4 Johns. Ch. 218, 222; Treadwell *v.* Union Ins. Co. 6 Cow. 270; Bryant *v.* Commonwealth Ins. Co. 6 Pick. 130; Hugg *v.* Augusta Ins. & Banking Co. 7 How. 595, 609; Adams *v.* Haught, 14 Texas, 243.

[3] Whitney *v.* N. Y. Firem. Ins. Co. 18 Johns. 208. In Hugg *v.* Augusta Ins. & Banking Co. 7 How. 595, 609, the court said: "It is obvious, therefore, that the perishable con-

does not cease although there be no ship lying by him suitable for the purpose; for he must use reasonable efforts to obtain one.[1] If he sends the goods on, he should take a bill of lading making them deliverable to the original consignees;[2] and he may pay the expense of sending them on, and charge his whole freight to the shipper or consignee; or he may, as we conceive, charge the consignee up to the port whence he transships the goods, and charge him also with the expense of transshipment. The rule, as usually expressed, is, that the master must transship if he can, and may then charge the *excess* of the cost of transshipment over his

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dition of the article must be taken into consideration in deciding upon the obligation of the master, in the emergency, to repair his vessel, or to procure another for the purpose of sending it on to the port of delivery. If it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article in specie before it could arrive at the port of destination, or from its damaged condition, could not be reshipped in time consistently with the health of the crew, or safety of the vessel, or would not be in a fit condition from pestilential effluvia, or otherwise, to be carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern." See also, Williams *v.* Kennebec Ins. Co. 31 Maine, 455; Ogden *v.* Gen. Mut. Ins. Co. 2 Duer, 204, 219; Smith *v.* Martin, 6 Binn. 262; Pope *v.* Nickerson, 3 Story, 465; Jordan *v.* Warren Ins. Co. 1 Story, 342; Roux *v.* Salvador, 3 Bing. N. C. 266; Vlierboom *v.* Chapman, 13 M. & W. 230.

[1] In Saltus *v.* Ocean Ins. Co. 12 Johns. 107, a vessel could have been procured at Cork, sixteen miles distant from the port of disaster, but the court held that the master was not bound to obtain one from there, but was only bound to seek for one in the port of distress, or in a port immediately contiguous. In Treadwell *v.* Union Ins. Co. 6 Cow. 270, the court said: "Some certain rule, to govern the discretion of the master, is desirable, wherever practicable. Although no general rule will govern every case, the approach to certainty will be considered beneficial to all parties. I think, then, the rule laid down in the last case is at once safe and reasonable. If there be a vessel in the same port, or a contiguous port, which is substantially the same thing, his duty is clear. The rule is imperative. But where resort must be had to distant places, and, independent of procuring a vessel, there are further serious impediments in the way of putting the cargo on board, the rule is not obligatory." See also, Hugg *v.* Augusta Ins. & Banking Co. 7 How. 595, 610; Whitney *v.* N. Y. Firemen Ins. Co. 18 Johns. 208. In Bryant *v.* Commonwealth Ins. Co. 6 Pick. 131, the vessel was stranded at the Washwoods, on the coast of Virginia. The goods might have been taken to Norfolk, which was distant forty miles, by land, and there reshipped, and the court held that if it were reasonable to require the master to procure a vessel from there, taking into view the nature of the voyage, and the time, expense, and risk of the transportation to the port of destination, he would be bound to do so. They said: "It may happen that a vessel might be procured at a port in another state, and not geographically contiguous to the port of distress, in convenient time and upon more reasonable terms, than could be had in the port of distress."

[2] Everett *v.* Saltus, 15 Wend. 474; s. c. *nom.* Saltus *v.* Everett, 20 Wend. 267.

freight to the owner of the goods.[1] The reason of this is, that as soon as such an exigency arises the master is clothed, from necessity, with authority to act as agent of all interested. For the ship-owner, he must do what can be done to save his freight; for the shipper, he must do what can be done to save his goods and send them to their port of destination.

He is the agent of both parties. And while he thus preserves his owner's right to freight, he lays upon the owner of the goods an obligation which is the same thing in fact, whether we say that the consignee must pay the whole freight *and* the excess of the cost of transshipment over what would have been the proportion of the freight earned by carriage on the original ship from the intermediate port, *or* the freight to that port, and the whole cost of transshipment.[2] And on a river a usage may be

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[1] In Rosetto *v.* Gurney, 11 C. B. 176, 188, 7 Eng. L. & Eq. 461, *Jervis*, C. J., referring to a case where the cargo was detained by perils of the sea at an intermediate port, said: "If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master transships, because the original ship is irreparably damaged, without considering whether he is bound to transship, or merely at liberty to do so, it is clear that he transships to earn his full freight, and so the delivery takes place upon the original contract. It may happen that a new bottom can only be obtained at a freight higher than the original rate of freight. It does not seem to have been settled, whether, in that case, the ship-owner may charge the cargo with the additional freight. By the French law he may do so, and as a consequence of that rule, the increased freight would be an average loss to be added to the other items. See Shipton *v.* Thornton, 9 A. & E. 314." In Hugg *v.* Augusta Ins. & Banking Co. 7 How. 595, 609, the court said: "The owner of the cargo is liable for any increased freight arising from the hire of another vessel, and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist upon this duty of the master. Beyond this it becomes a question between him and the owner or underwriter of the cargo." See also, Searle *v.* Scovell, 4 Johns. Ch. 218; Am. Ins. Co. *v.* Center, 4 Wend. 45; Mumford *v.* Comm. Ins. Co. 5 Johns. 262. A question has been made how far an insurer on the cargo is liable for this advance freight. Shultz *v.* Ohio Ins. Co. 1 B. Mon. 339. We shall consider this question in our chapters on Insurance.

[2] In Shipton *v.* Thornton, 9 A. & E. 314, Lord *Denman*, C. J., said: "No case of the sort that we are aware of has occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present question. It may well be that the master's right to transship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity, as agent of

shown to charge lighterage in addition to freight, when the water is so low that the boat cannot proceed.[1]

If he can transship and will not, then the shipper is entitled to his goods without making any payment of freight; for the master or ship-owner has no interest in, or lien on the goods whatever, except he has earned his freight, or is about to earn it. And if neither of these things is true, the shipper is entitled to his goods without any burden or charge upon them.[2]

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the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owner's *right* to transship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and if so, it will be the duty of the master, as his agent, to do so. *In such a case*, the freighter will be bound by the act of his agent, and of course be liable for the increased freight." See also the remarks of Mr. Justice *Story*, in Jordan *v.* Warren Ins. Co. 1 Story, 342, 352, 353. In Gibbs *v.* Gray, Exch. 1857, 40 Eng. L. & Eq. 531, the vessel chartered by the plaintiffs, and loaded with guano consigned to them, put into Valparaiso in distress, and it became necessary to transship and forward the cargo. The captain who was appointed by the owners of the vessel, accordingly entered into a charter-party with the defendants, the owners of another vessel, to take the guano on at a stipulated rate of freight. The charter-party stated the number of tons to be 470. The guano was put on board the latter ship, but it appeared that the quantity was much less than 470 tons. The plaintiffs had agents at Valparaiso, but they were not consulted. The plaintiffs, on the arrival of the vessel, agreed to pay the rate of freight in the charter-party on the number of tons actually delivered, but the defendants demanded freight on the number mentioned in the charter-party. This was finally paid under protest, and this action brought to recover it back. The court intimated a very strong doubt whether the master of a ship has any authority to send goods on without giving the agent of the owner any option to receive them, when the agent is known to be at the place. It was held that the master had no authority to bind the plaintiffs to pay dead freight for goods not actually transshipped, and that he could not bind the owners of the goods by a charter-party to provide a full cargo.

[1] Andrews *v.* Roach, 3 Ala. 590.

[2] In Hunter *v.* Prinsep, 10 East, 378, 394, Lord *Ellenborough* said: "If the ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject." See also, Portland Bank *v.* Stubbs, 6 Mass. 422; Adams *v.* Haught, 14 Texas, 243. In Welch *v.* Hicks, 6 Cow. 504, the court held that it was a question for the jury to decide, whether the master intended *bonâ fide* to repair the vessel and com-

Instead of transshipping, he may tender the goods at the intermediate port to the shipper, and the shipper may refuse to accept, and then the master must transship if he can; or the shipper may accept the goods at that place, and then he must pay freight *pro rata itineris;* that is, must pay such part or proportion of the whole freight as the part of the voyage performed is of the whole voyage.[1]

Many questions have been raised respecting this *pro rata* payment of freight, and some of them are not yet finally settled.

The principal question is, what acceptance on the part of the shipper lays upon him the obligation of this payment. Formerly, it was held, that any acceptance was sufficient to have this effect; now it seems to be the law that the acceptance must be voluntary. Questions of this kind are often complicated with the particular facts of the case, and it is therefore difficult to lay down any abstract rule which will serve to decide and determine all cases. If the earliest leading case be law,[2] then if a ship is captured and recaptured and brought into any port nearer to her destination than the port from which she sailed, and there the shipper takes his goods, he must pay freight *pro rata*, whatever may have been the motive from which, or the compulsion under which, he took them. But this rule, which has been much qualified in England, has been, if not positively set aside, modified in a yet greater degree in this country. Here, it now seems to be held, that the acceptance must be voluntary

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plete the voyage, and whether the acceptance of the goods was voluntary on the part of the defendant, the shipper. For, if not, the court held that the ship-owner would not be entitled to any freight. See Armroyd *v.* Union Ins. Co. 3 Binn. 437.

[1] The contract of affreightment, as we have seen, being entire, the ship-owner will not be entitled to recover on the contract unless it be completely performed. Sturges *v.* Gairdner, 2 Brev. 233. But like any other contract this may be terminated by the consent of the parties to it. And if the contract is put an end to, and the shipper voluntarily receives his goods, the shipper has, from the earliest times, been held liable to pay a ratable freight. Roccus, note 81; Laws of Oleron, art. 10; Ordinance of Wisbuy, art. 16, 37; Consolato del Mare, and The Rhodian Laws as cited by Lord *Mansfield*, in Luke *v.* Lyde, 2 Burr. 882, 889; Maylne, Lex Mercatoria, p. 98; Lutwidge *v.* Grey, cited in Luke *v.* Lyde, and at length in Abbott on Shipping, 438; Luke *v.* Lyde, 2 Burr. 882. See also, Parsons *v.* Hardy, 14 Wend. 215; Rossiter *v.* Chester, 1 Dong. Mich. 154; Hunt *v.* Haskell, 24 Maine, 339; Forbes *v.* Rice, 2 Brev. 363.

[2] Luke *v.* Lyde, 2 Burr. 882.

in substance and fact, or no claim for freight arises from it.[1] According to the earlier view, if the goods arrived at the intermediate port, the owner of them must either take and pay freight, or refuse to take at all. Now, if the possession of the goods is in fact forced upon him, if there seems to be no alternative and he takes under what may be regarded as a strict compulsion, or if the goods or their proceeds are thrown upon him without his action, he thereby incurs no obligation to pay any freight.[2]

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[1] The difficulty in regard to the law on this point has arisen from losing sight of the nature of the contract. The master is entitled to take the goods on to the port of destination, and thus earn his freight, and the shipper has a right to say that this shall be done. If, therefore, the goods are given up to the shipper at the intermediate port, it must be by virtue of a new contract made by the parties. And as the shipper has a right to have the goods taken on, he cannot, against his consent, be compelled to receive them at the intermediate port. The case of Luke *v.* Lyde has been generally considered as warranting the broad proposition that the shipper is bound to pay a *pro rata* freight if he receives the goods at any place short of the port of destination, whether such reception be voluntary or not. And in some early cases in this country it seems to have been thus understood. United Ins. Co. *v.* Lenox, 1 Johns. Cas. 377; Williams *v.* Smith, 2 Caines, 13; Robinson *v.* Mar. Ins. Co. 2 Johns. 323. See also, Post *v.* Robertson, 1 Johns. 24; Baillie *v.* Moudigliani, Park on Ins. 70. Whether the case of Luke *v.* Lyde justified such a construction is, at least, doubtful; but, however this may be, the law is now well settled that the acceptance must be voluntary. See Liddard *v.* Lopes, 10 East, 526; Cook *v.* Jennings, 7 T. R. 381; Mulloy *v.* Backer, 5 East, 316; Vlierboom *v.* Chapman, 13 M. & W. 230; Mar. Ins. Co. *v.* United Ins. Co. 9 Johns. 186; Welch *v.* Hicks, 6 Cow. 504; Center *v.* Am. Ins. Co. 7 Cow. 564, 582; Armroyd *v.* Union Ins. Co. 3 Binn. 437; Hurtin *v.* Union Ins. Co. 1 Wash. C. C. 530; Callender *v.* Ins. Co. of N. A. 5 Binn. 525; Gray *v.* Waln, 2 S. & R. 229; Caze *v.* Balt. Ins. Co. 7 Cranch, 358; Sampayo *v.* Salter, 1 Mason, 43; Col. Ins. Co. *v.* Catlett, 12 Wheat. 383; Hooe *v.* Mason, 1 Wash. Va. 207; Rossiter *v.* Chester, 1 Doug. Mich. 154; Adams *v.* Haught, 14 Texas, 243; The Nathaniel Hooper, 3 Sumner, 542. See also, Pinto *v.* Atwater, 1 Day, 193; Dorr *v.* N. E. Mar. Ins. Co. 4 Mass. 221; Coffin *v.* Storer, 5 Mass. 252.

[2] It was held, in Welch *v.* Hicks, 6 Cow. 504, that when a master refuses to repair his ship, and send on the goods, or to provide other vessels for this purpose, and the owner of the goods then receives them, this will not be a voluntary acceptance. So, too, where a vessel had been captured, and all the goods condemned, excepting those of the plaintiff, which were sold by the defendant, who claimed a right to deduct from the proceeds the stipulated freight for the whole voyage, or at least, a *pro rata* freight, the court held, that none was due. Sampayo *v.* Salter, 1 Mason, 43. Mr. Justice *Story* said: "But it never has been supposed that a *pro rata* freight was due, when by a capture the party has been incapable of performing the voyage, and the shipper has been compelled to receive his goods at the hands of the admiralty." See also, Mar. Ins. Co. *v.* United Ins. Co. 9 Johns. 186. In Armroyd *v.* Union Ins. Co. 3 Binn. 437, the vessel was condemned, sold, and the voyage broken up. The goods also were sold, and the net proceeds paid to the supercargo. Held, no freight was due. In Hurtin *v.* Union Ins. Co. 1 Wash. C. C. 530, where the vessel was captured, but not condemned,

However reasonable this rule may be in theory, it must very often be of difficult application. The equity, in all these cases, would seem to be this: if the owner of the goods receives them at any intermediate port, with their value increased by the carriage of them to that port, he should pay the ship-owner for this increase of value. But if he sends them to one place, and receives them at another because he cannot well help himself, and they are worth to him no more at this port than at the port from which they sailed, then nothing is due from him to the ship-owner. This we say is the equity of the case, and it is, we think, the tendency of the modern adjudications of this question to apply to each case a rule which will work out this equity.[1]

The master is not authorized to accept the cargo at an intermediate port, so as to charge the owner with a *pro rata* freight.[2] And if he sells the cargo and the shipper lays claim to the proceeds, this does not amount to a voluntary acceptance on his part.[3] If the shipper abandons the goods to the underwriter after the voyage is broken up, it has been held that a *pro rata* freight is due.[4]

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and the supercargo thought it was for the best interest of all concerned that the goods should be sold, Mr. Justice *Washington* said: "But if it is received by compulsion, and the supercargo or captain is acting for the best, for the benefit of all concerned, with a view to preserve it for the person entitled to receive the proceeds, no freight is earned." See also, Callender *v.* Ins. Co. of N. A. 5 Binn. 525; Gray *v.* Waln, 2 S. & R. 229; Caze *v.* Balt. Ins. Co. 7 Cranch, 358; Pinto *v.* Atwood, 1 Day, 193; Halwerson *v.* Cole, 1 Speers, 321. In The Nathaniel Hooper, 3 Sumn. 542, 566, Mr. Justice *Story* held an acceptance to be voluntary which, he says, "is, if I may so say, a reluctant acquiescence forced upon them by an overruling necessity."

[1] Coffin *v.* Storer, 5 Mass. 252. In accordance with this rule it has been decided that, where a vessel receives damage, and puts back to the port, from which she started, and the master chooses to deliver up the goods when he is not obliged to, no freight will be due, because no beneficial service has been rendered by the ship-owners. Scott *v.* Libby, 2 Johns. 336; Miston *v.* Lord, 1 Blatchf. C. C. 354; Lord *v.* Neptune Ins. Co. Sup. Jud. Ct. Mass. Nov. T. 1857. See also, Jordan *v.* Warren Ins. Co. 1 Story, 342. In the case of The Hiram, 3 Rob. Adm. 180, the vessel sailed on a voyage from Liverpool to Halifax. She was captured and brought back to Plymouth. Sir William *Scott* held that was the same as if she had been brought to Liverpool, for the shipper had derived no benefit from the voyage. He therefore held that no freight whatever was due.

[2] Vlierboom *v.* Chapman, 13 M. & W. 230; The Ann D. Richardson, Abbott, Adm. 499, 1 Blatchf. C. C. 358; Miston *v.* Lord, 1 Blatchf. C. C. 354; The Brig Velona, U. S. D. C. Mass., Boston Courier, Dec. 15, 1857.

[3] See p. 166, n. 2, and cases in note *supra*.

[4] Van Norden *v.* Littlejohn, 2 Taylor, 16.

It is obvious that no freight *pro rata* can be recovered on the original contract. A claim for it can be sustained only on the ground of an implied assumpsit;[1] and this again, would seem to have no other foundation than the general rule, that one who accepts and holds a benefit rendered, must acknowledge himself indebted for it. In like manner, if a ship is chartered to carry a cargo on a certain voyage, and a part of the cargo is lost by the perils of the sea, and a part is carried and delivered and accepted, although there may be no recovery of any part of the charter-money in an action on the charter-party itself, yet an action may be maintained on the implied assumpsit for freight for the goods carried and received.[2]

It is not quite certain how the proportion shall be calculated, when *pro rata* freight is due. There are in fact but two ways of doing this. The part of the voyage for which freight is to be paid may be a geographical part, or a commercial (or a *pecuniary*) part. That is, the shipper may be held to pay, as in the earlier cases, so much per mile or league, for what has been done out of the whole voyage, or so much as it would cost to bring them to the port at which the goods are accepted. Every

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[1] The action in Luke *v.* Lyde, 2 Burr. 882, although it is not so stated in the report of the case, was assumpsit, and not an action on the original contract. See Cook *v.* Jennings, 7 T. R. 381. Abbott also, in his Treatise on Shipping, p. 444, says that he had examined the record, and found that the declaration was for the freight of goods carried in the plaintiff's ship, without mentioning from or to what place. See also Christy *v.* Row, 1 Taunt. 300; Mulloy *v.* Backer, 5 East, 316; Liddard *v.* Lopes, 10 East, 526; Vlierboom *v.* Chapman, 13 M. & W. 230; Robinson *v.* Mar. Ins. Co. 2 Johns. 323; Mar. Ins. Co. of N. Y. *v.* Un. Ins. Co. 9 Johns. 186; Armroyd *v.* Un. Ins. Co. 3 Binn. 437, 447; Callender *v.* Ins. Co. of N. A. 5 Binn. 525; Caze *v.* Balt. Ins. Co. 7 Cranch, 358; The Nathaniel Hooper, 3 Sumner, 542; Hurtin *v.* Union Ins. Co. 1 Wash. C. C. 530. See also cases ante, p. 166, note 1.

[2] Post *v.* Robertson, 1 Johns. 24; Coffin *v.* Storer, 5 Mass. 252. If a charter-party is entered into for a time certain, at a given rate per month, and in the same proportion for whatever time the vessel may be employed, and is afterwards dissolved by mutual consent, *pro rata* compensation can be recovered under a special count alleging the employment of the vessel from the time stipulated for the charter-party to commence till its dissolution, or it may be recovered under a general count of *indebitatus assumpsit*. Wheeler *v.* Curtis, 11 Wend. 653. And an action of covenant can be maintained in a case where a vessel is let to perform several voyages, and performs an intermediate voyage at the request of the charterer's agent, the voyages described in the charter-party having been performed, and the charterer in the action of covenant seeking to recover no recompense for the additional voyage. Solomon *v.* Higgins, 6 Wend. 425.

rule must be a modification of one of these. The latter rule is that which we think is favored, and will generally be adopted in this country; and the simplest method of applying it would be, for the shipper to pay the whole freight, deducting what would be the ordinary or usual cost of carrying the cargo from the port at which he received them to that of their original destination.[1]

The questions relating to *pro rata* freight have often arisen in cases of capture and recapture, or release and return of the ship; or condemnation and sale of the ship and cargo and an ultimate recovery of the proceeds; or sale under decree for salvage, and payment of proceeds to the shipper or his representatives, after deducting salvage. We do not consider these cases by themselves, for the general rules and principles, we have already stated, are perfectly applicable to them. Where goods never arrive at their port of destination, but are captured and retaken, or restored, or sold by decree and the proceeds paid over, at some other port or place, such reception of the cargo or its proceeds would not now be considered a voluntary acceptance, so as to raise the assumpsit on which the implied promise to pay *pro rata* freight must rest, unless there were peculiar facts or stipulations to sustain such an implication.[2] It should be

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[1] In Luke *v.* Lyde, 2 Burr. 882, 888, Lord *Mansfield* said: "Here the master had come seventeen days of his voyage, and was within four days of the destined port when the accident happened. Therefore he ought to be paid his freight for 17-21st parts of the full voyage." In Robinson *v.* Mar. Ins. Co. 2 Johns. 323, owing to the circumstances of the case, the rule of Luke *v.* Lyde was adopted. *Kent*, C. J., however, in delivering the opinion of the court, considered the rule laid down in Marine Ins. Co. *v.* Lenox, decided by the court for the correction of errors in New York, to be more equitable when it could be applied. That rule was to ascertain how much of the voyage had been performed, not when the ship first encountered the peril, and was interrupted in her course, but when the goods had arrived at the intermediate port, because *that* was the extent of the voyage performed as far as regarded the interest of the shipper. In Coffin *v.* Storer, 5 Mass. 252, it was held that freight was not to be calculated according to the portion of the voyage performed, compared with that of the whole voyage, but the actual benefit which the shipper received by the transportation.

[2] Escopiniche *v.* Stewart, 2 Conn. 391. In this case rice was shipped to Bermuda. On the way the vessel was captured, and taken to Antigua, but the captain of the privateer, on finding that it belonged to the defendant, delivered it up to a passenger on board the vessel, who sold it, and sent the proceeds to the defendant. It was held that this did not amount to an acceptance so as to render the defendant liable for freight. See also, cases cited ante, pp. 166, 167.

added, that if the parties, in the original contract, whether by bill of lading or otherwise, choose to stipulate — as they sometimes do — that no claim shall arise under any circumstances for *pro rata* freight, no such claim will be given by any implication of law. If a vessel, after her arrival in port, is ordered to perform quarantine, and the cargo is landed and stored in the quarantine ground, the shipper or consignee is bound to pay the expense of landing and storage.[1] And if it is the custom for the consignee, when the vessel is at quarantine, to send down persons at his own expense to pack and take care of the goods, a neglect on his part to do this will exonerate the master for damage to the goods occasioned by their coming on shore loose.[2]

We have seen that no claim for freight exists until delivery; but the goods must be delivered also in good condition, or if damaged, then from causes for which the ship-owner is not responsible.[3] And it has been recently determined, that the owners of a general ship are liable to a shipper for damage done to the goods from other goods stowed in the hold, without allegation or proof of any wilful or negligent default on the part of the ship-owner.[4] And it would seem that they are so liable, even if the goods doing the injury were put on board in a condition to do mischief, by the shippers of the damaged goods, the proximate cause of the injury being the stowage of them by the captain too near the other goods.[5] And the legal pre-

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[1] Rice *v.* Clendining, 3 Johns. Cas. 183.

[2] Dunnage *v.* Joliffe, before Lord *Kenyon*, C. J., 1789, cited in Abbott on Shipping, 380. See also, ante, p. 152, note 3.

[3] Clark *v.* Barnwell, 12 How. 272; Malynes, Lex Mercatoria, p. 102; Boucher *v.* Lawson, Cases temp. Hardw. 78, 183; Parish *v.* Crawford, 2 Stra. 1251; Bellamy *v.* Russell, 2 Show. 167; Shields *v.* Davis, 6 Taunt. 65, 4 Camp. 119; Gibson *v.* Sturge, 10 Exch. 622, 29 Eng. L. & Eq. 460; Schureman *v.* Withers, Anthon, 166; Bartram *v.* M'Kee, 1 Watts, 39; Leech *v.* Baldwin, 5 Watts, 446; Humphreys *v.* Reed, 6 Whart. 435; Ewart *v.* Kerr, 1 Rice, 203; Ewart *v.* Kerr, 2 M'Mullan, 141.

[4] Gillespie *v.* Thompson, cited 6 Ellis & B. 477, note, 36 Eng. L. & Eq. 227; Brousseau *v.* Ship Hudson, 11 La. Ann. 427. But see Baxter *v.* Leland, Abbott, Adm. 348, 1 Blatchf. C. C. 526.

[5] Alston *v.* Herring, 11 Exch. 822, 36 Eng. L. & Eq. 475. The defendant's plea in this case set up a charter-party, by which the defendant as owner, chartered the ship to the plaintiffs, and agreed to load a cargo from the plaintiffs' factors, and carry and deliver it. It also alleged that the plaintiffs shipped the goods mentioned in the declaration, and also contracted with a third party to receive from him and carry

sumption arising from the statement in the bill of lading, that the goods doing the damage were in good order when shipped, cannot affect a third party.[1]

The question has arisen whether shippers are not answerable to the owners of the vessel, for putting on board dangerous goods, or goods insufficiently packed, the dangerous character of which cannot be discovered by easy inspection, and is not made known to the owners by the shippers, and it would seem that they are so liable.[2] So if a shipper puts on board, without

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certain cases of sulphuric acid for freight to be paid to the plaintiffs, and that it was the duty of the plaintiffs as the shippers to give notice to the owners of the ship of the article being sulphuric acid, in order that it might be stowed in some place where, if it leaked, it would not come in contact with other parts of the cargo, that no notice was given, that they caused the cases to be stowed near the goods mentioned in the declaration, and that some of the acid leaked and damaged the goods, and so prevented the defendant from performing the agreement, and that the damage was occasioned by the plaintiffs' neglect. The court held this plea to be bad; *Alderson*, B., said: "It is true the plea alleges that but for the shipment of the acid without notice, the damage would not have happened. But the shipment alone would not be enough. A further act would be necessary, namely, the placing of the acid where it was placed in the ship, and that was the defendant's act, and he was the immediate causer of the damage." In answer to the objection that the suit could not be maintained, because in a cross action the defendants would have to refund the sum demanded, the court said: "In such an action might not the plaintiffs well contend that though the defendant would not have put the cases where he did had he known the contents, yet as he was content to run the risk of their containing some fluid which might have caused the damage, it would be unreasonable to make the plaintiffs liable for the whole damage, because it turned out that the cases contained sulphuric acid? We think so. It is true the plea states the cases were placed where they were without any neglect, default, or wrongful act of the defendant. That means no more than that the so placing them was neither neglect nor intrinsically wrong. Be it so. But it is certain had the contents of the cases been some fluid, and not sulphuric acid, which had escaped and damaged the cambric, the plaintiffs would have been entitled to recover, whether the defendant had been negligent or not. We think, therefore, a jury might take that into their consideration, in estimating the damages which the now defendant would sue the plaintiffs for, on the supposed contract not to ship sulphuric acid without notice, and consequently the damages in such an action might be different from those recoverable in this action, and that the rule for preventing circuity of action does not apply."

[1] Brousseau *v.* Ship Hudson, 11 La. Ann. 427.

[2] Brass *v.* Maitland, 6 Ellis & B. 470, 36 Eng. L. & Eq. 221. The fourth plea of the defendants was held to be good. It was that the master knew, or had the means of knowing, and reasonably might, could, and ought to have known that the goods shipped, namely, bleaching powder, contained chloride of lime, and that the master and persons employed about the ship knew and had the means of judging, and knowing the state and condition and sufficiency of the casks. But the court were not unanimous in respect to a plea, setting forth that the master knew or had the means of knowing and ought to have known the nature of bleaching powder. One of the judges was inclined

the knowledge of the captain, goods which are forbidden to be exported, he is liable if the ship is seized.[1] Where a cargo of goods was delivered in a damaged condition, and it was sold by the consignees with the consent of the master, and the evidence showed that it would have sold better had the damaged part been separated from the rest, but that it would have been tedious and troublesome to have done so, it was held that it was the duty of the master, and not of the consignees, to have made such separation.[2]

A literal and precise application of the provisions of the bill of lading would deprive the ship-owner of all freight, if the goods were not delivered in as good condition as received. In practice, however, if the goods are delivered, but damaged by causes for which the ship-owner is responsible, the freight is payable, but the shipper may claim compensation for the damage, whether it be greater or less in amount than the freight; and may claim it by way of set-off, or by an independent action.[3]

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to dissent from the decision, holding the plea good, on the ground that the master was not the party generally concerned in the shipping, taking on board, or stowing of goods.

[1] Sparks *v.* West, 1 Wash. C. C. 238.

[2] The Columbus, Abbott, Adm. 37.

[3] In England the rule is well settled that the shipper cannot, in an action brought against him for freight, set up, in defence, that the goods were damaged by the negligence of the carrier, but is obliged to resort to a cross action. Bellamy *v.* Russell, 2 Show. 167; Bornmann *v.* Tooke, 1 Camp. 377; Shields *v.* Davis, 6 Taunt. 65, 4 Camp. 119. In Gibson *v.* Sturge, 10 Exch. 622, 29 Eng. L. & Eq. 460, 466, the court said: "It is clear, according to the general law on the subject, that the circumstance of the wheat being damaged, does not at all affect the right of the plaintiffs to freight." The reason that the shipper is obliged to resort to a cross action, is owing to the English statutes of set-off, (2 Geo. II. c. 22, § 15, and 8 Geo. II. c. 24, § 4,) which do not allow a claim of this nature to be offsetted. In this country, however, the statutes of set-off in the various States are generally of a more liberal nature, and the shipper has therefore been allowed to set up in defence, in the nature of a set-off, the damage done to the goods by the carrier. And Lord *Campbell*, C. J., in Thompson *v.* Gillespy, 5 Ellis & B. 209, 32 Eng. L. & Eq. 153, says it is a reproach to the legislature that parties have not the means of settling cross claims, except by distinct actions. In those states where the question has not yet arisen, it must be decided, when it is presented by the provisions of the statutes of set-off of the respective states. An examination of these statutes is, however, foreign to the purposes of this work. We shall therefore merely cite the cases where the question has arisen and been decided. Schureman *v.* Withers, Anthon, 166; Ogden *v.* Coddington, 2 E. D. Smith, 317; Hinsdell *v.* Weed, 5 Denio, 172; Bartram *v.* M'Kee, 1 Watts, 39; Leech *v.* Baldwin, 5 Watts, 446; Humphreys *v.* Reed, 6 Whart. 435; Ewart *v.* Kerr, 1 Rice, 203; Ewart *v.* Kerr, 2 M'Mullan, 141; Edwards *v.* Todd, 1 Scam. 462; Ship Rap-

The great difficulty lies in determining whether the ship-owner is liable for the damage or not.

SECTION V.

OF SHIPS AS COMMON CARRIERS.

Ships are often called common carriers; and that they may be so is certain; but that all ships which carry goods are to be treated as common carriers, cannot be true; and the language used in relation to this subject is either inaccurate and loose, or is misunderstood because it is not interpreted by a reference to the facts of the case in which it is used. Thus in a leading case on the law of carriers,[1] it is intimated that there is no case which makes any distinction between a land and a water carrier. But that case related to regular inland navigation. And in an American case,[2] the court say, that "a carrier by water, whether by inland navigation or coastwise from port to port, or to and from foreign countries, is a common carrier." But the court cannot mean that every carrier by water is a common carrier, for then there would be a very great difference between land and water carriers. The vessel in that case was a coasting vessel plying between Boston and Philadelphia; and the court must have meant, *such* a carrier by water as they were then considering. The true rule undoubtedly is, that one who carries by water, in the same way and on the same terms as a common carrier by land, is also a common carrier; or, in other words, it is not the

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pahannock *v.* Woodruff, 11 La. Ann. 698; Glover *v.* Dufour, 6 La. Ann. 490; Waring *v.* Morse, 7 Ala. 343; Boggs *v.* Russell, 13 B. Mon. 239. In Snow *v.* Carruth, U. S. D. C., Mass., 19 Law Reporter, 198, it was held by *Sprague*, J., that damage done to the goods could be set up as a defence to an action brought against a consignee for freight, in admiralty. See also, Bradstreet *v.* Heron, Abbott, Adm. 209; Thatcher *v.* McCulloh, Olcott, Adm. 365. And in a subsequent case, in an action for freight, it being proved that the damage done to the goods by the fault of the carrier, exceeded the freight, the libel was dismissed. Bearse *v.* Ropes, 19 Law Reporter, 548. See also, Zerega *v.* Poppe, Abbott, Adm. 397. So if suit is brought for damage done to the goods, freight is to be deducted. See ante, p. 151, note 2.

[1] Trent Navigation Co. *v.* Wood, 3 Esp. 127.

[2] Hastings *v.* Pepper, 11 Pick. 41, 43.

land or the *water* which determines whether a carrier of goods is a common carrier, but other considerations, which are the same in both cases.

What, then, are these considerations? We take a common carrier to be one who offers to carry goods for any person, between certain termini or on a certain route; and he is bound to carry for all who tender to him goods and the price of carriage, and insures those goods against all loss but that arising from the act of God or the public enemy; and has a lien on the goods for the price of carriage. These are essentials; and though any or all of them may certainly be modified, and as we think may be controlled, by express agreement, yet if either of these elements is wanting from the relation of the parties, without any such agreement, then we say the carrier is not a common carrier, either by land or by water.

If we are right in this, no vessel would be a common carrier, that did not ply regularly, alone or in connection with others, on some definite route, or between two certain termini. No vessel is therefore a common carrier unless she be what is commonly called a packet, or sail in a packet line. All general ships would be excluded; and all vessels under steam or canvas, on lakes or rivers, which are like general ships; for they would be as a private or casual carrier by land, and would be no more a common carrier because on the water. Then, if we allowed another essential element, — the obligation to carry for all who offer, — to exist in the case of regular packets, which might be doubted, it can hardly be supposed that every owner of a vessel put up as a general ship, loses all right of refusal or choice of goods or shippers, unless the commodities offered are either dangerous or unusual. And on the whole, while we admit that our lake and river vessels which run in regular lines may be common carriers, and extend the same rule to our coasting packets, and, also, but with somewhat less certainty, to ocean packets, we should be disposed to stop there, and say that other vessels are private or casual carriers, and not common carriers.[1]

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[1] It seems to be taken for granted by all the authorities that a general ship is a common carrier, and liable as such, whether a bill of lading is given or not. The precise question, however, has never been decided in any reported case, and we cannot but believe that, when it does arise, the *dicta* of the judges and text writers will be disre-

This question, however, is of less practical importance, because, if they are common carriers, the modification of their

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garded, and the subject receive that investigation which, from its importance, it deserves. It has been held, from the earliest times, that a common carrier by water has imposed on him the same liabilities as a common carrier by land, and that the master of a vessel can be sued as well as the owners. Morse *v.* Slue, T. Raym. 220, Ventris, 238, 2 Lev. 69; Rich *v.* Kneeland, Croke Jac. 330, Hob. 17; Boson *v.* Sandford, 2 Salk. 440, 1 Show. 29, 101, 3 Lev. 258, and Carth. 58; Goff *v.* Clinkard, cited in 1 Wilson, 282. Mr. Justice *Story*, in his treatise on Bailments, § 501, speaks of vessels employed in the coasting trade, or in foreign trade, for all persons offering goods for the port of destination, as general ships. The language of the court in Allen *v.* Sewall, 2 Wend. 327, and 6 Wend. 335, is even more loose than this. On p. 343, *Savage*, C. J., calls a steamboat plying regularly between New York and Albany, a general ship. Now, if such a vessel is a general ship, then a general ship is a common carrier; but a general ship is something very different from this, and from confounding the two the difficulty in a great measure has arisen. It cannot however be denied that there are *dicta* to be found which cannot thus be explained. Thus in Laveroni *v.* Drury, 8 Exch. 166, 170, 16 Eng. L. & Eq. 510, *Pollock*, C. B., said: "By the law of England the master and owner of a general ship are common carriers for hire, and responsible as such. This, according to the well-known rule, renders them liable for every damage which occurs during the voyage, except that caused by the act of God, or the Queen's enemies." He then says they may limit their liability by the bill of lading, which is then the evidence of the contract made between the parties. In Clark *v.* Barnwell, 12 How. 272, the vessel was a general ship; but a bill of lading was given. On p. 280, the court speak of the master and owners as common carriers. See also the remarks of Mr. Justice *Story* in King *v.* Shepherd, 3 Story, 349; also Kemp *v.* Coughtry, 11 Johns. 107. In the following cases packets were held to be common carriers. Hyde *v.* Trent & Mersey Nav. Co. 5 T. R. 389; Trent Nav. Co. *v.* Wood, 3 Esp. 127; Hastings *v.* Pepper, 11 Pick. 41; Elliott *v.* Rossell, 10 Johns. 1; Kemp *v.* Coughtry, 11 Johns. 107; Colt *v.* M'Mechen, 6 Johns. 160; The Schooner Reeside, 2 Sumner, 567; Crosby *v.* Fitch, 12 Conn. 410; M'Clures *v.* Hammond, 1 Bay, 99; Williams *v.* Grant, 1 Conn. 487; Mershon *v.* Hobensack, 2 Zabris. 372. In Oakey *v.* Russell, 18 Mart. La. 58, goods were shipped from New York to New Orleans. It does not appear whether the vessel was a packet or not, or whether a bill of lading was given. The defendants were held liable as common carriers. Parker *v.* Flagg, 26 Maine, 181, is a similar case. It was admitted that the defendants were common carriers. The facts are not fully given in the report of the case. In the following cases it does not appear whether the vessel was a packet or not, but a bill of lading was given. King *v.* Shepherd, 3 Story, 349; Watkinson *v.* Laughton, 8 Johns. 213; Ferguson *v.* Cappeau, 6 Harris & J. 394. It is well settled that steamboats which ply regularly from place to place are liable as common carriers. The Huntress, Davcis, 82; Citizens Bank *v.* Nant. Steamboat Co. 2 Story, 16; Jencks *v.* Coleman, 2 Sumner, 221; Gilmore *v.* Carman, 1 Sm. & M. 279; M'Gregor *v.* Kilgore, 6 Ohio, 358; McArthur *v.* Sears, 21 Wend. 190; Dunseth *v.* Wade, 2 Scam. 285; Hart *v.* Allen, 2 Watts, 114; Pardee *v.* Drew, 25 Wend. 459; Allen *v.* Sewall, 2 Wend. 327; Sewall *v.* Allen, 6 Wend. 335; Harrington *v.* M'Shane, 2 Watts, 443; Porterfield *v.* Humphreys, 8 Humph. 497; Hale *v.* N. J. Steam Nav. Co. 15 Conn. 539; Singleton *v.* Hilliard, 1 Strob. 203; Orange Bank *v.* Brown, 3 Wend. 158; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. 344; Bennett *v.* Filyaw, 1

liability by bills of lading is undoubtedly valid, and nearly all

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Flor. 403; Charleston & Col. Steamboat Co. *v.* Bason, Harper, 262; Jones *v.* Pitcher, 3 Stew. & P. 135; Swindler *v.* Hilliard, 2 Rich. 286; Benett *v.* The Peninsular & Oriental Steamboat Co. 6 C. B. 775. Steam tow-boats are not however generally considered common carriers in respect to the boats which they have in tow. Caton *v.* Rumney, 13 Wend. 387; Alexander *v.* Greene, 3 Hill, 1. This case was reversed on appeal, 7 Hill, 533. In a subsequent case in the same State, the court of appeals pronounced the decision in 7 Hill, 533, not to be law. Mr. Justice *Bronson* said: "It is true that the judgment in Alexander *v.* Greene was reversed by the court of errors. But what particular point or principle of law was decided by the court, or what a majority of the members thought upon any particular question of law no one can tell." Wells *v.* Steam Nav. Co. 2 Comst. 204. See also, Penn., Del., & Md. Nav. Co. *v.* Dandridge, 8 Gill & J. 248; Leonard *v.* Hendrickson, 18 Penn. State, 40; Abbey *v.* The R. L. Stevens, U. S. D. C., N. Y., 21 Law Reporter, 41. In Louisiana it is held that tow-boats are common carriers. Smith *v.* Pierce, 1 La. 349; Adams *v.* New Orleans Steamboat Co. 11 La. 46. See also the opinion of Mr. Justice *Kane*, in Vanderslice *v.* The Steam Tow-boat Superior, 13 Law Reporter, 399. The reasoning of the learned judge in this case is worthy of a careful examination, as it furnishes a very strong argument in favor of the doctrine of holding tow-boats liable as common carriers. When the case came before the circuit court, *Grier*, J., said, that he could not assent to the doctrine that tow-boats were common carriers. Where the tug and boats belonged to the same persons, and goods were shipped under a bill of lading, the owners of the tug were held liable as common carriers. Sprowl *v.* Kellar, 4 Stew. & P. 382. Canal boatmen, and those on rivers, are held to be common carriers. Fuller *v.* Bradley, 25 Penn. State, 120; Spencer *v.* Daggett, 2 Vt. 92; Arnold *v.* Halenbake, 5 Wend. 33; De Mott *v.* Laraway, 14 Wend. 225; Parsons *v.* Hardy, 14 Wend. 215; Humphreys *v.* Reed, 6 Whart. 435; Bowman *v.* Teall, 23 Wend. 306. In Eveleigh *v.* Sylvester, 2 Brev. 178, it was said that the doctrine of common carriers did not apply with full force to boats on the rivers, but this doctrine does not seem to have been followed. In Lengsfield *v.* Jones, 11 La. Ann. 624, it was held that, under a bill of lading in the ordinary form, a flat-boat was liable as a common carrier. See, also, Harrington *v.* Lyles, 2 Nott & McC. 88; Gordon *v.* Buchanan, 5 Yerg. 71; Turney *v.* Wilson, 7 Id. 340. In regard to ferrymen it was held in Walker *v.* Jackson, 10 M. & W. 161, that they were not generally common carriers, though a usage might be shown to that effect. In this country, however, a ferryman is generally considered a common carrier. Cook *v.* Gourdin, 2 Nott & McC. 19; Babcock *v.* Herbert, 3 Ala. 392; Smith *v.* Seward, 3 Barr, 342; Pomeroy *v.* Donaldson, 5 Mo. 36; Cohen *v.* Hume, 1 McCord, 439; Littlejohn *v.* Jones, 2 M'Mullan, 365; Rutherford *v.* M'Gowen, 1 Nott & McC. 17; Wilson *v.* Hamilton, 4 Ohio State, 722; Albright *v.* Penn, 14 Texas, 290; Fisher *v.* Clisbee, 12 Ill. 344. In all the cases cited, where the owner or master has been held liable as a common carrier, his occupation has been to carry for every one who should offer him goods for carriage, and where this has been his usual employment. And it is a well-settled principle that if a person on land makes a contract to carry goods, when it is not his usual custom so to do, he cannot be held as a common carrier. Fish *v.* Chapman, 2 Kelly, 349; Samms *v.* Stewart, 20 Ohio, 69. See also, Fuller *v.* Bradley, 25 Penn. State, 120. Now if we apply the rule that there is no difference between carriers on land and carriers by water, a general ship cannot be considered as a common carrier, for "the contract for the conveyance of merchandise in a general ship," as defined by Lord *Tenterden* (Abbott on Ship. 319), "is that

the carriage of goods by water is now regulated by bills of lading.[1]

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by which the master and owners of a ship destined on a particular voyage, engage separately with various merchants unconnected with each other, to convey their respective goods to the place of the ship's destination." In Lane *v.* Cotton, 12 Mod. 472, 484, it was said that many actions have been maintained against carriers for refusing to take goods, though the cases were not reported. See also, Jackson *v.* Rogers, 2 Show. 327; Riley *v.* Horne, 5 Bing. 217; Harris *v.* Packwood, 3 Taunt. 264, 272, per *Lawrence*, J.; Hollister *v.* Nowlen, 19 Wend. 234, 239; Edwards *v.* Sherratt, 1 East, 604; Batson *v.* Donovan, 4 B. & Ald. 21, 32; Elsee *v.* Gatward, 5 T. R. 143; Fish *v.* Chapman, 2 Kelly, 349; Jencks *v.* Coleman, 2 Sumner, 221; Dwight *v.* Brewster, 1 Pick. 50; Bennett *v.* Dutton, 10 N. H. 481. And, as it is by no means unusual for the master or owner of a general ship to refuse to take the goods of all who offer, the question will probably come up in this way. Suppose, for instance, a merchant has a quantity of merchandise which he wishes to send to a foreign port, he therefore charters a vessel, but having room to spare, puts up part of the vessel as a general ship. It would be for his interest that no goods of the same description as his should be taken in his vessel. If any were offered we think he clearly would not be bound to take them, and if not, he should not be considered a common carrier.

[1] Thus in Pope *v.* Nickerson, 3 Story, 465, 473, Mr. Justice *Story* said: "Whether the schooner was a common carrier, that is, a general carrier vessel, whose mere employment was to take goods on board for hire for any persons whatever, or whether she was simply a carrier vessel employed on the present voyage *pro hac vice*, has been much discussed at the bar. But in my judgment nothing does, in this case, turn upon any distinction between the cases; for under the bills of lading, precisely the same obligations attach to the owners and the master in regard to the shippers, whether she was a general, or common carrier, or simply a carrier *pro hac vice*. The bills of lading ascertain, and fix, and control the liability, and the exceptions therein contained cover the usual risks, not taken by the owners." The power of a carrier to limit or increase his liability by a special contract was early recognized in England. But that he could make such a contract by a general notice, brought home to the knowledge of the party, is a doctrine of much later origin. Mention is first made of it by Mr. Justice *Burrough*, in Smith *v.* Horne, 8 Taunt. 144. He says: "The doctrine of notice was never known until the case of Forward *v.* Pittard, 1 T. R. 27, which I argued many years ago." The case referred to was decided in 1785, and as reported does not mention the subject of notice. It was first held that he might thus limit his responsibility in Nicholson *v.* Willan, 5 East, 507. See also, Maving *v.* Todd, 1 Stark. 72; Leeson *v.* Holt, 1 Stark. 186; Evans *v.* Soule, 2 M. & S. 1; Ellis *v.* Turner, 8 T. R. 531. This question has been put to rest in England by the Carrier's Act of 2 Geo. IV., and 1 Will. IV. c. 68. In this country the subject has been the theme of fruitful investigation and research. It has generally been held that such a notice is of no avail even though brought home to the knowledge of the party. Hollister *v.* Nowlen, 19 Wend. 234; Cole *v.* Goodwin, id. 251; Camden & Amboy Railroad Co. *v.* Belknap, 21 Wend. 354; Clark *v.* Faxton, id. 153; Dorr *v.* N. J. Steam. Nav. Co. 1 Kern. 485; Farmers & Mechanics Bank *v.* Champlain Transp. Co. 23 Vt. 186; Kimball *v.* Rutland & Burlington Railroad Co. 26 Vt. 247; Moses *v.* Boston & Maine Railroad, 4 Foster, 71; Jones *v.* Voorhees, 10 Ohio, 145; Hale *v.* N. J. Steam Nav. Co. 15 Conn. 539; Logan *v.* The Pontchartrain Railroad Co. 11 Rob. La. 24; Sloeum *v.* Fairchild, 7 Hill, 292; N. J. Steam Nav. Co. *v.* Merch. Bank, 6 How. 344, 382. See also, Thomas *v.* Boston & Providence Railroad Co. 10 Met. 472. In some cases, however,

The "dangers of the seas" are usually excepted in these bills; if the words are, "perils, or dangers of the river, or of

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it has been held, that if the notice is brought home to the knowledge of the party, he will be presumed to have contracted with reference to it, as in England, and the notice therefore will be binding. Bean *v.* Green, 12 Me. 422; Sager *v.* Portsmouth, S. & P. Railroad Co. 31 Me. 228; Camden & Amboy Railroad Co. *v.* Baldauf, 16 Penn. State, 67; Atwood *v.* The Reliance Transp. Co. 9 Watts, 87; Laing *v.* Colder, 8 Barr, 479; Barney *v.* Prentiss, 4 Harris & J. 317. But, however the law may be as to the effect of a notice, it is well settled that a carrier may enlarge or diminish his liability by a special contract, and if he is not a common carrier may assume the risks, and be liable *as* one. Thus, in Fish *v.* Chapman, 2 Kelly, 349, a person who undertook to carry goods and deliver them in good order and condition, unavoidable accidents only excepted, was held liable as a common carrier. In Gaither *v.* Barnet, 2 Brev. 488, common carriers, who undertook to carry goods *safely*, were not exonerated by loss from *unavoidable accidents*. See also, Harmony *v.* Bingham, 2 Kern. 99. But see The Casco, Daveis, 184. The general proposition, that a carrier can make a special contract, was assumed as law in England in Kenrig *v.* Eggleston, Aleyn, 93; Southcote's case, 4 Coke, 84; Gibbon *v.* Paynton, 4 Burr. 2298, 2301, per *Yates*, J.; Catley *v.* Wintringham, Peake, 150. See also, Nicholson *v.* Willan, 5 East, 507; Harris *v.* Packwood, 2 Taunt. 264; Riley *v.* Horne, 5 Bing. 217. The American authorities generally support the proposition. Atwood *v.* Reliance Transp. Co. 9 Watts, 87; Hollister *v.* Nowlen, 19 Wend. 234, 246; Beckman *v.* Shouse, 5 Rawle, 179; N. J. Steam Nav. Co. *v.* Merch. Bank, 6 How. 344, 382; Swindler *v.* Hilliard, 2 Rich. 286, 302; Gordon *v.* Little, 8 S. & R. 533; Farmers and Mech. Bank *v.* Champlain Transp. Co. 23 Vt. 186; Kimball *v.* Rutland & Burlington Railroad Co. 26 Vt. 247; Davidson *v.* Graham, 2 Ohio State, 131; Graham *v.* Davis, 4 Ohio State, 362; Bentley *v.* Bustard, 16 B. Mon. 643; Baker *v.* Brinson, 9 Rich. 201. In Gould *v.* Hill, 2 Hill, 623, a memorandum was given by the carrier stating the receipt of the goods, and adding, "which we promise to forward, dangers of fire, etc. excepted." The court held the carrier liable, although the goods were destroyed by fire, on the ground that such a special contract was against the policy of the law and could not be made. In the following cases it was also doubted whether such a contract would be of any effect. Fish *v.* Chapman, 2 Kelly, 349; Hale *v.* N. J. Steam Nav. Co. 15 Conn. 539. And in Wells *v.* Steam Nav. Co. 2 Comst. 204, 209, *Bronson*, J., speaks of the question as being still, perhaps, a debatable one. Such a position, however, cannot be supported on any principle of law whatsoever; and Gould *v.* Hill has been overruled by several recent cases in New York. Parsons *v.* Monteath, 13 Barb. 353; Moore *v.* Evans, 14 Barb. 524; Mercantile Mutual Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Dorr *v.* N. J. Steam Nav. Co. 4 Sandf. 136, 1 Kern. 485. See also, Stoddard *v.* Long Island Railroad Co. 5 Sandf. 180. In three of these cases bills of lading were given, which contained exceptions against fire. As the goods were destroyed by fire, the courts held the carriers not responsible. It was however held by the supreme court of the state of Michigan, in the recent case of Michigan Central Railroad Co. *v.* Ward, 2 Mich. 538, that as the plaintiffs were common carriers by their charter, which was in the nature of a contract between them and the state, permanently binding upon each, and the principal engagement on their part being to become and remain common carriers, their liability as common carriers became irrevocably fixed; and therefore they could not alter or modify this liability by any stipulation or contract. In Schieffelin *v.* Harvey, 6 Johns. 170, 180, *Van Ness*, J., speaking of a special contract, said: "It ought to be clear, and capable of but one construction, unequivocally and necessarily

the lakes, or of water, or of navigation," all which are used in different parts of this country, the meaning and effect is the same as of "dangers of the seas."[1] In one case the words "dangers of the roads" in a bill of lading were held to mean, either dangers peculiar to marine roads in which vessels lie at anchor, or those which are caused immediately by roads on land, as the overturning of carriages in rough and precipitous places.[2]

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evincing that such was the intention of both the parties." And in Merriman *v.* Brig May Queen, 1 Newb. Adm. 464, where the following was stamped on a bill of lading, "Goods to be receipted for on the levee; not accountable for rust, breakage, leakage, cooperage; weight and contents unknown," the court held that this was not such a certain and specific contract between the parties as left no room for controversy. It has always been the settled doctrine in this country, that, though a carrier could make a special contract, yet he could not thereby be exempt from loss arising from his own negligence. N. J. Steam Nav. Co. *v.* Merchants Bank, 6 How. 144; Laing *v.* Colder, 8 Barr, 479; Dorr *v.* Steam Nav. Co. 4 Sandf. 136; Sager *v.* The Portsmouth, S. & P. Railroad Co. 31 Me. 228; Slocum *v.* Fairchild, 7 Hill, 292; Camden & Amboy Railroad Co. *v.* Baldauf, 16 Penn. State, 67; Reno *v.* Hogan, 12 B. Mon. 63; Swindler *v.* Hilliard, 2 Rich. 286; Davidson *v.* Graham, 2 Ohio State, 131; Graham *v.* Davis, 4 Ohio State, 362; Baker *v.* Brinson, 9 Rich. 201; Stoddard *v.* Long Island Railroad Co. 5 Sandf. 180. The earlier cases in England are also to the same effect. Smith *v.* Horne, 8 Taunt. 144; Beck *v.* Evans, 16 East, 244; Duff *v.* Budd, 3 Brod. & B. 177; Brooke *v.* Pickwick, 4 Bing. 218; Bodenham *v.* Bennett, 4 Price, 31; Birkett *v.* Willan, 2 B. & Ald. 356; Batson *v.* Donovan, 4 B. & Ald. 21; Garnett *v.* Willan, 5 B. & Ald. 53; Sleat *v.* Fagg, id. 342; Wright *v.* Snell, id. 350; Wyld *v.* Pickford, 8 M. & W. 443; Lyon *v.* Mells, 5 East, 428. In several late cases in England it has however been held that the carrier may make any contract he pleases. And it has been decided that where a person sent cattle by railroad, taking all risk of conveyance, the carrier would not be liable, though the cattle were lost by reason of the car in which they were put being utterly unfit for the purpose. Chippendale *v.* Lancashire, etc. Railway Co. 21 Law J. (N. S.) Q. B. 22, 7 Eng. L. & Eq. 395. See also, Shaw *v.* York & North Midland Railway Co. 13 Q. B. 347; Carr *v.* Lancashire & Yorkshire Railway Co. 7 Exch. 707, 14 Eng. L. & Eq. 340; Austin *v.* M. S. & L. R. Co. 10 C. B. 454, 11 Eng. L. & Eq. 506; Morville *v.* Great Northern Railway Co. 21 Law J. (N. S.) Q. B. 319, 10 Eng. L. & Eq. 366.

[1] In Jones *v.* Pitcher, 3 Stew. & P. 135, 176, the court said: "The perils of the sea and of the river are so nearly allied that they may be considered the same, except in the few instances in which the reason differs." See also, Turney *v.* Wilson, 7 Yerg. 340; Fairchild *v.* Slocum, 19 Wend. 329; Gordon *v.* Little, 8 S. & R. 533; Whitesides *v.* Russell, 8 Watts & S. 44; McGregor *v.* Kilgore, 6 Ohio, 143; Dunseth *v.* Wade, 2 Scam. 285; Johnson *v.* Friar, 4 Yerg. 48; Gordon *v.* Buchanan, 5 Yerg. 71; Williams *v.* Branson, 1 Murph. 417; Gilmore *v.* Carman, 1 Sm. & M. 279; Bentley *v.* Bustard, 16 B. Mon. 643, 681.

[2] De Rothschild *v.* Royal Mail Steam-Packet Co. 7 Exch. 734, 14 Eng. L. & Eq. 327. The bill of lading in this case covered also land carriage, and it was held that theft without violence while the goods were being transported by railway was not within the exception.

Abbott, in his treatise on shipping,[1] says, that in consequence of the decision in Smith *v.* Shepherd, decided in England in 1795, (in which case, however, there does not seem to have been any bill of lading,) the exception in common use in England is, "The act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted." The purpose of this alteration undoubtedly was to restore the bill of lading to the meaning and operation which it was supposed to have had before that case. We think, however, though this case (which we shall consider more fully in another connection) be law, that the term "dangers of the seas" includes substantially all that is comprehended in the latter part of the new phrase.

The courts sometimes seem to identify "dangers of the seas" with the "act of God," as meaning precisely the same thing.[2] But this is certainly erroneous. Any act of God by means of which a vessel or her cargo was destroyed or damaged at sea, could hardly fail from being a peril of the sea. But there are a great many causes of damage for which the ship is not responsible, that are not acts of God.[3] When, by the ancient rule of the common law, the common carrier was held to insure against all losses but those caused by the "act of God or of the king's enemies," the reason and the meaning were, to

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[1] Page 322.

[2] Fish *v.* Chapman, 2 Kelly, 349, 356, 357; Crosby *v.* Fitch, 12 Conn. 410; Neal *v.* Saunderson, 2 Sm. & Mar. 572; Walpole *v.* Bridges, 5 Blackf. 222; Williams *v.* Grant, 1 Conn. 487; Ready *v.* Steamboat Highland Mary, 17 Mo. 461, 20 id. 264.

[3] The distinction between "an act of God" and "a peril of the sea," is clearly defined in McArthur *v.* Sears, 21 Wend. 190, 198. The court say: "There is a considerable class of cases arising upon exceptions in bills of lading, of the 'perils of the sea,' where in addition to losses from natural causes, those arising from the acts of third persons are sometimes allowed to come within the terms. Such are losses by robbery of pirates. Pickering *v.* Barkley, Style, 132; Buller *v.* Fisher, Abbott on Ship. 385. But these words are evidently of broader compass than the words 'acts of God,' and although it was supposed by a very learned judge that they were but commensurate, (*Gould*, J., in Williams *v.* Grant, 1 Conn. 487, 492,) and therefore whatever was a peril of the sea would excuse the carrier acting under his general liability, yet it is evident from the cases we have considered that they are not always so." See also, The Schooner Reeside, 2 Sumner, 567; Gordon *v.* Buchanan, 5 Yerg. 71; Plaisted *v.* Boston & Kennebec Steam Nav. Co. 27 Me. 132; Proprietors of Trent & Mersey Nav. Co. *v.* Wood, 3 Esp. 127, 4 Doug. 287, per Lord *Mansfield*, C. J.

The earliest mention of the perils of the seas in a charter-party is in Pickering *v.* Barkley, Style, 132, per *Kent*, C. J., in Elliott *v.* Rossell, 10 Johns. 1.

hold him responsible if there were any possibility of his having any agency in the loss. And therefore the phrase "the king's enemies," was ruled not to include the violence of a mob, or riot, or civil commotion of any nature; but only the act of an enemy in public war;[1] which there was obviously no actual possibility of the carrier having caused; or, in case of a carrier by water, robbery by pirates, who are the universal enemies of mankind.[2] But for embezzlements on board by the crew,[3] or by other persons not pirates, the owners are liable, although there is no negligence on their part.[4] And their liability does not cease on the vessel being wrecked unless the property perishes in the wreck.[5] So the act of God is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were *possible*, he should be held.[6]

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[1] Forward *v.* Pittard, 1 T. R. 27, 34, per Lord *Mansfield*, C. J.; Story on Bailments, § 25.

[2] Pickering *v.* Barkley, 2 Roll. Ab. 248, Style, 132.

[3] Schieffelin *v.* Harvey, 6 Johns. 170; Watkinson *v.* Laughton, 8 Johns. 213.

[4] In Morse *v.* Slue, 1 Vent. 190, 238, and in Barclay *v.* Cuculla y Gana, 3 Doug. 389, the master was held liable for the loss of goods occasioned by a forcible robbery while the ship was lying in the river. In Schieffelin *v.* Harvey, 6 Johns. 170, which was an action against the owner of a vessel, on a bill of lading, it appeared that the vessel arrived at the port of destination with the goods on board, but they not being admissible, it was agreed between the master and the consignees that the goods should remain on board, and be returned to the owner when the vessel went back. On the goods being returned it was found that a portion had been taken, and the court held the defendant liable, whether the loss had been caused by the embezzlement of the crew or by the custom-house officers at the port of destination. In King *v.* Shepherd, 3 Story, 349, a robbery from the ship by salvors was held to be a loss for which the owners were liable.

[5] King *v.* Shepherd, 3 Story, 349. But the rule would probably be different now under the Act of 1851, 9 U. S. Stats. at Large, 635. See Wattson *v.* Marks, 2 Am. Law Register, 157.

[6] The Zenobia, Abbott, Adm. 80. Fish *v.* Chapman, 2 Kelly, 349, 356, 357; Robertson *v.* Kennedy, 2 Dana, 430; Williams *v.* Grant, 1 Conn. 487; Bell *v.* Reed, 4 Binn. 127; Gordon *v.* Buchanan, 5 Yerg. 71; Jones *v.* Pitcher, 3 Stew. & P. 135; Sprowl *v.* Kellar, 4 Stew. & P. 382; Trent & Mersey Nav. Co. *v.* Wood, 4 Doug. 287, 290; Forward *v.* Pittard, 1 T. R. 27. The act of God must be the proximate cause of the loss. Therefore where a severe storm caused an unusually low tide, and in consequence thereof the carrier's barge struck against a timber which projected from the wharf, which in ordinary tides was too low to do any injury, the carrier was held liable. New Brunswick S. B. Co. *v.* Tiers, 4 Zabris. 697. See also, Oakley *v.* Steam-Packet Co. 11 Exch. 618, 34 Eng. L. & Eq. 530; Smith *v.* Shepherd, Abbott on Ship-

The cases are frequent in practice, and not unfrequent in the books, in which "dangers of the seas" has a very different meaning from "the act of God." Thus, a common carrier would be responsible for goods burned in his waggon, if they were destroyed in a conflagration which began at a distance by the act of an incendiary, and extended to the shed or barn in which he had put them, although he could prove that he had nothing to do with the fire, and did all that the most careful and skilful man could do to save his goods.[1] And if such a conflagration reaches a ship moored at a wharf and destroys her, the shipper of goods destroyed in the vessel would now look to the ship-owner. If the ship-owner were a common carrier, then the shipper would look to him under the general law of common carriers. If he were not a common carrier, and was bound only by a bill of lading, then he would be liable, provided fire be not "a peril of the seas." Usually there is now in most bills of lading an express exception against fire.

The simple question whether a loss by fire is a loss by a peril of the sea, which one would suppose must have been settled long since, is scarcely determined now. But the cases we give in the notes tend strongly and perhaps decidedly to the conclusion, that fire is *not* a peril of the sea, as between the ship-owner and shipper of goods.[2]

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ping, 383. So if an iron vessel runs on shore, owing to her compass not being sufficiently protected to traverse correctly, this is not a peril of the sea, or an act of God, which will exonerate the carrier. Bazin *v.* Richardson, U. S. C. C., 20 Law Reporter, 129, 5 Am. Law Register, 459.

[1] Forward *v.* Pittard, 1 T. R. 27.

[2] If a ship is a common carrier, the same rules would be applicable, as in the case of a carrier on land, and therefore an owner of a vessel would be liable for a loss caused by an accidental fire, unless there was something in the bill of lading, the special contract between the parties, which exempted him from this liability. And, if a ship is not a common carrier, we think it equally clear that the owner would not be liable unless a bill of lading were given. The question then arises whether a fire, which is not caused by lightning, can be said to be either "an act of God" or "a peril of the sea." That it is not "an act of God" is settled in the following cases: Harrington *v.* M'Shane, 2 Watts, 443; Hale *v.* N. J. Steam Nav. Co. 15 Conn. 539; Singleton *v.* Hilliard, 1 Strob. 203; Parker *v.* Flagg, 26 Maine, 181; Patton *v.* Magrath, Dudley, S. C. 159.

Is fire "a peril of the sea," as between the shipper and ship-owner? It is so asserted as well-settled law in Plaisted *v.* Boston & Kennebec S. Nav. Co. 27 Maine, 132, citing Marsh. on Ins. c. 12, § 3, and Hale *v.* N. J. Steam Nav. Co. 15 Conn. 539. In the

So, too, if a man rolled a rock into the shallow channel of a river, and the first vessel that came along, having no cause to

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first place, in the case of Plaisted *v.* Boston & Kennebec S. Nav. Co. the goods were damaged by a collision, and not by fire, and the expression of opinion is therefore *obiter*, and moreover the authorities cited do not support it. Marshall merely says that a policy of insurance covers a loss occasioned by an accidental fire. In Hale *v.* Steam Nav. Co. the only point decided was, that an accidental fire was not the act of God. No bill of lading was given. In Gilmore *v.* Carman, 1 Sm. & M. 279, a bill of lading was signed containing an exception against *dangers of the river*. Held, that this meant the same as perils of the seas, and that the carrier was liable for a loss by fire. See also, Morewood *v.* Pollok, 1 Ellis & B. 743, 18 Eng. L. & Eq. 341; N. J. Steam Nav. Co. *v.* Merch. Bank, 6 How. 344; Garrison *v.* Memphis Ins. Co. 19 How. 312; Parsons *v.* Monteath, 13 Barb. 353; Gould *v.* Hill, 2 Hill, 623; Merc. Mut. Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Dorr *v.* N. J. Steam Nav. Co. 4 Sandf. 136; Swindler *v.* Hilliard, 2 Rich. 286. And in Airey *v.* Merrill, 2 Curtis, C. C. 8, Mr. Justice *Curtis* held, that under a covenant in a charter-party to restore the vessel to the owners, "dangers of the seas excepted," the charterer was liable for the value of the vessel, in case of its destruction by an accidental fire, originating on board, such fire not being one of the "dangers of the seas" within the exception. The only case in which fire has been held to be a "peril of the sea" is Hunt *v.* Morris, 6 Mart. La. 676. In Hunters *v.* Morning Star, Newfoundland Rep. 270, there is a *dictum* to the same effect. In that case the fire was caused by gross negligence in the construction of the chimney of a steamboat, and the carrier was held liable. In 1785 a statute was passed in England providing, "That no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good, to any one or more persons, any loss or damage, which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to, or on board the said ship or vessel." 26 Geo. 3, c. 86, § 2. In 1851 a statute of similar import was passed in this country. It provided also, that the parties might make any contract they pleased, extending or limiting the liability of the ship-owners, and that the act should not apply to any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in river or inland navigation. Stat. 1851, c. xliii., 9 U. S. Stats. at Large, 635. In Morewood *v.* Pollok, 1 Ellis & B. 743, 18 Eng. L. & Eq. 341, it was held, that the statute of 26 Geo. 3, c. 86, applied only to goods on board a vessel, and that the carrier was therefore liable for a loss by fire, while the goods were on lighters, and were being conveyed to the ship for the purpose of transportation. But in a late case in New York it has been held that the ship is not liable in such a case under our statute of 1851. Dill *v.* The Bertram, U. S. D. C., N. Y. But it has been held, by Mr. Justice *Curtis*, in the United States Circuit Court for the first circuit, on the authority of Morewood *v.* Pollok, that the statute does not exonerate the ship for a loss by fire after the goods are on the wharf, but before they are delivered. Salmon Falls Co. *v.* Bark Tangier; Goddard *v.* Same; Pearson *v.* Same, 21 Law Reporter, 6, 12, and in several cases growing out of the destruction of the ship Middlesex, April 26, 1855. The cargo was landed on the wharf, but had not been delivered to the consignees when it was consumed by fire. The court held the ship-owners liable. One of these cases may be found, *nom.* The Ship Middlesex, 21 Law Reporter, 14. And in Gatliffe *v.* Bourne, 4 Bing. N. C. 314, 5 Scott, 667, Arnold, 120, affirmed in the Exchequer Chamber, 3 Man. & G. 643, and in the House of Lords, 7 Man. & G. 850, it seems to have been taken for granted that the statute

suspect any obstruction, struck upon it, this we should hold as certainly not an act of God, but quite as certainly a "danger of the seas."[1] For we think that this phrase includes all the perils of every kind actually connected with navigation, whether man did or did not cause them, wholly or partially, provided it is certain that neither the ship-owner nor the shipmaster was in any fault, and that neither want of care, skill, or endeavor could be imputed to them.[2]

Although the conduct of the master or owner be negligent, yet if the loss occurs from independent causes, the ship-owner is not responsible.[3]

Thus if goods are stowed on deck which should be in the hold, and are washed off in a tempest, although this be the act of God,

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did not apply where the goods were unloaded, but destroyed by fire before delivery to the consignee.

[1] But the sudden shifting of the channel, and the recent introduction of a hidden sawyer or snag are considered, when unknown, as acts of God. Patton *v.* Magrath, Dudley, S. C. 159. Nevertheless, the carrier must show, in such a case, that he used due diligence and proper skill to avoid the accident, and that it was unavoidable. Whitesides *v.* Russell, 8 Watts & S. 44. In Friend *v.* Woods, 6 Grat. 189, the vessel was injured by running on a bar which had recently been formed, and the goods damaged. No bill of lading was given. The court held that, though the defendants were ignorant of its formation, yet, if by human foresight and diligence, it might have been ascertained and avoided, they would be liable. The court said: "The cases in which the carriers have been exonerated from losses occasioned by such obstructions, will, I think, upon examination, be found to be cases in which either the bills of lading contained the exception of the perils of the river, or in which that exception has been confounded with the exception of the act of God." See also, Johnson *v.* Friar, 4 Yerg. 48; Gordon *v.* Buchanan, 5 Yerg. 71; Turney *v.* Wilson, 7 Yerg. 340; Everleigh *v.* Sylvester, 2 Brev. 178; Smyrl *v.* Niolon, 2 Bailey, 421; Faulkner *v.* Wright, Rice, 107; Williams *v.* Grant, 1 Conn. 487. In Collier *v.* Valentine, 11 Mo. 299, it was held that negligence was not necessarily imputable, where a boat struck on a known rock or shoal. But this is against the current of authority, as shown by the cases cited above. See Bentley *v.* Bustard, 16 B. Mon. 643. If a boat attempts to pass, in the night, a point known to be dangerous, it is a question for the jury on all the circumstances of the case whether such an act was negligence. Ready *v.* Steamboat Highland Mary, 17 Mo. 461, 20 id. 264.

[2] Mr. Justice *Story*, in the case of the Schooner Reeside, 2 Sumner, 567, seems to have considered the meaning of the expression doubtful. He says: "The phrase danger of the seas, whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

[3] See post, p. 185, n. 3.

yet human default has coöperated, and the ship is responsible;[1] but if the ship founders in the tempest and goes down, she is no more responsible for the goods on deck than for those in the hold. So the master is bound to stow the goods aright, with proper dunnage, etc., and in such arrangement and position as the character of the goods, their liability to break, etc., requires. But though he fail in these respects, and damage happens to the goods thus badly stowed, he is not answerable if he can show that the damage did not happen *because* they were badly stowed.[2] If the loss *might* have happened without the master's fault, this does not excuse him; but if it *must* have happened, although he had not been in fault, he is exonerated.[3]

Goods on deck, when jettisoned from necessity, cannot claim contribution in general average by the general law merchant.[4] And if they are so carried by agreement with the shipper, he can have no claim against any party for the loss.[5] But if car-

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[1] The Rebecca, Ware, 188; The Waldo, Daveis, 161; Stinson *v.* Wyman, id. 172; Waring *v.* Morse, 7 Ala. 343; Dorsey *v.* Smith, 4 La. 211; The Peytona, Ware, 2d ed. 541, 2 Curtis, C. C. 21; Sayward *v.* Stevens, 3 Gray, 97; Gardner *v.* Smallwood, 2 Hayw. N. C. 349. See also, Taunton Copper Co. *v.* Merch. Ins. Co. 22 Pick. 108.

[2] The Brig Casco, Daveis, 184; Hastings *v.* Pepper, 11 Pick. 41; The Schooner Reeside, 2 Sumner, 567; The Newark, 1 Blatchf. C. C. 203; Clark *v.* Barnwell, 12 How. 272; Rich *v.* Lambert, id. 347. See also, Glover *v.* Dufour, 6 La. Ann. 490; Bearse *v.* Ropes, U. S. D. C., Mass., Nov. 1856, 19 Law Reporter, 548. In Baxter *v.* Leland, Abbott, Adm. 348, 1 Blatchf. C. C. 526, it was held, that where there is a well-known usage as to the manner of stowage, and to the placing of different products together, the shipper, if he wishes his goods stowed in a different manner, must give notice to the master, and if he does not, and his goods are injured in consequence of such stowage, the ship-owner will not be liable. See also, Lamb *v.* Parkman, U. S. D. C., Mass., 20 Law Reporter, 186, and ante, p. 170, note 4. It was held in Swainston *v.* Garrick, Exch. of Pleas, Trin. Term, 1833, 11 Law J. 255, that where a shipper was to send a person to stow the goods, the master would not be liable if they were improperly stowed. See also, Arnold *v.* Anderson, 2 Yeates, 93.

[3] Thus, in Gardner *v.* Smallwood, 2 Hayw. N. C. 349, the court said: "Taking a full price and stowing upon deck will subject the owner of the vessel to pay damages, if what is placed on deck be *thereby* lost, or damaged; but if *that* did not occasion the loss, he will be no more liable for damage to that part of the cargo than to the rest." See also, The Waldo, Daveis, 161, 171, per *Ware*, J.; and Lawrence *v.* Minturn, 17 How. 100, n. 5, *infra*. In Vernard *v.* Hudson, 3 Sumner, 405, it was held, that where the goods were shipped on deck without the consent of the owner, but were delivered in good order, the consignee was bound only to pay a deck freight, and Mr. Justice *Story* intimated that at common law no freight whatever would be due.

[4] See post, ch. 9, § 2.

[5] In Lawrence *v.* Minturn, 17 How. 100, it was held that where iron boilers had been

ried there without his consent, and then jettisoned from necessity, it should seem that the shipper should claim from the ship-owner what he loses by having no claim for contribution; for though it was not the fault of the master that the goods were lost, it is his fault that their loss gives no claim for contribution.[1] The burden is on the ship-owner to prove that the shipper agreed that the goods should be carried on deck.[2]

We shall treat of this subject again in the chapter on General Average.

If goods are carried on deck without the consent of the shipper, and are lost by a peril of the seas, the owner will be responsible, although the bill of lading contained a clause excepting the liability of the owner for a loss by perils of the sea. For this exception does not lessen his obligation to carry the goods in the proper and customary manner.[3]

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stowed on deck with the consent of the shipper, and were jettisoned by necessity, the owner of the vessel would not be liable. Mr. Justice *Curtis*, in delivering the opinion of the court, after speaking of the maritime codes, said: "There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner; and they afford very high evidence, of the general and appropriate usages, in this particular, of merchants and ship-owners. Consolato del Mare, par Pardessus, c. 186; Ord. de la Mar. Valin, lib. 2, tit. 1, art. 12; Code du Com. Mar. par Locré, art. 229, lib. 2, tit. 4, art. 229; Emerigon, ch. 12, sec. 42; Boulay Paty, tome 4, 566, 568." And again: "The extent to which we understand the authorities to go, and the law which we intend to lay down, is this: That if the vessel is sea-worthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm in all probability would have produced no injurious effect on the vessel if not thus laden. If the vessel is in itself staunch and sea-worthy, and her inability to resist a storm arises solely from the position of a part of the cargo on deck, the owner of the cargo, who has consented to this mode of shipment, cannot recover from the ship or its owners, on the ground of negligence, or breach of an implied contract respecting sea-worthiness." See also, Smith *v.* Wright, 1 Caines, 43; Dorsey *v.* Smith, 4 La. 211; Hampton *v.* Brig Thaddeus, 4 Mart. La. 582; Shackleford *v.* Wilcox, 9 La. 33; Cram *v.* Aiken, 13 Maine, 229; Sproat *v.* Donnell, 26 Maine, 185; Johnston *v.* Crane, 1 Kerr, New Brunswick, 356; Sayward *v.* Stevens, 3 Gray, 97.

[1] The Paragon, Ware, 322; Barber *v.* Brace, 3 Conn. 9; Creery *v.* Holly, 14 Wend. 26; Gould *v.* Oliver, 2 Man. & G. 208, 4 Bing. N. C. 134, 2 Scott, N. R. 241.

[2] The Peytona, 2 Curtis, C. C. 21.

[3] The Rebecca, Ware, 188; The Waldo, Daveis, 161; Stinson *v.* Wyman, Daveis, 172; Waring *v.* Morse, 7 Ala. 343. But if no damage results from their being put on deck, the owner of the vessel will not be liable for injury happening from any other

SECTION VI.

OF COLLISION.

Collision is a very common accident in harbors, and not very rare at sea. The rule in this country is, that the party in fault must suffer his own loss and compensate the other party for what loss he may sustain.[1] But if neither be in fault, the loss rests where it falls.[2] If both are substantially in fault, the loss

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cause, and the shipper must pay freight. Gardner *v.* Smallwood, 2 Hayw. N. C. 349; Vernard *v.* Hudson, 3 Sumner, 405.

[1] The Scioto, Daveis, 359; The Woodrop-Sims, 2 Dods. 83; Reeves *v.* Ship Constitution, Gilpin, 579; The Sappho, 9 Jur. 560. See also, cases *infra* generally.

[2] When a collision takes place by inevitable accident, without blame being imputable to either party, as where it is occasioned by a storm, or any other *vis major*, the misfortune must be borne by the party on whom it happens to light. In this, the civil law, the common law, and the maritime law of Europe, of England, and of this country, agree. Dig. 9. 2. 9; Consulat de la Mer, par Boucher, 200–203; Pardessus, Droit Com. tome iii. 652; The French Code de Commerce, art. 407; Valin, Ord. de la Marine, liv. 3, tit. 7, art. 10, vol. 2, p. 177; Emerigon, c. 12, § 14; (see, however, the Laws of Oleron, art. 15, and The Ordinance of Wisbuy, arts. 29, 49, 50, and 65; Boulay Paty, Cours de Droit Com. Mar. tit. 12, s. 6, vol. 4, p. 493;) The Woodrop-Sims, 2 Dods. 83; The Celt, 3 Hagg. Adm. 328, note; Jameson *v.* Drinkald, 12 Moore, 148; The Catherine of Dover, 2 Hagg. Adm. 145, 154; The Shannon and The Placidia, 7 Jur. 380; s. c. *nom.* The Shannon, 1 W. Rob. 463; The Thornley, 7 Jur. 659; The Ebenezer, 2 W. Rob. 206; The Itinerant, 2 W. Rob. 236; The Scioto, Daveis, 359; Reeves *v.* Ship Constitution, Gilpin, 579; Stainback *v.* Rae, 14 How. 532; The Eliza and Abby, 1 Blatchf. & H. 435; The Moxey, Abbott, Adm. 73. See also, The Ligo, 2 Hagg. Adm. 356; Steamboat Co. *v.* Whilldin, 4 Harring. Del. 228; Cummins *v.* Spruance, 4 Harring. Del. 315; The Brig Veruma *v.* Clark, 1 Texas, 30; Myers *v.* Perry, 1 La. Ann. 372; Duggins *v.* Watson, 15 Ark. 118; Fashion *v.* Wards, 6 McLean, C. C. 152. Dr. *Lushington*, in The Virgil, 7 Jur. 1174, 2 W. Rob. 201, defines an inevitable accident to be "that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." See also, The Lochlibo, 3 W. Rob. 310, 318, 1 Eng. L. & Eq. 651; The Europa, 2 Eng. L. & Eq. 557; The England, 5 Notes of Cases, 170; The John Buddle, 5 Notes of Cases, 387; The Juliet Erskine, 6 Notes of Cases, 633. In The Bolina, 3 Notes of Cases, 208, it was held, that where there is no *primâ facie* case of negligence, and want of seamanship, and the party proceeded against alleges inevitable accident, the burden is not on him to prove it, but the party seeking indemnification must prove that the other party was to blame. If a vessel, performing a salvage service, injures another, the injury will generally be considered as unavoidable. Stevens *v.* Steamboat S. W. Downs, 1 Newb. Adm. 458.

also rests where it falls, by the rules of the common law.[1] If it cannot be ascertained where the fault lies, the rule may not be quite certain; but there is reason for saying that at common law the loss will not rest where it falls, but be divided between the two vessels. In admiralty this is more positively asserted, and it seems to us the proper rule.[2] In admiralty the rule was

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[1] Luxford *v.* Large, 5 Car. & P. 421; Vanderplank *v.* Miller, Moody & M. 169; Lack *v.* Seward, 4 Car. & P. 106; Sills *v.* Brown, 9 Car. & P. 601; Handaysyde *v.* Wilson, 3 Car. & P. 528, 530, per *Best*, C. J.; Vennall *v.* Garner, 1 Cromp. & M. 21, 3 Tyrw. 85; Simpson *v.* Hand, 6 Whart. 311; Broadwell *v.* Swigert, 7 B. Mon. 39; Rathbun *v.* Payne, 19 Wend. 399; Barnes *v.* Cole, 21 Wend. 188; Kelly *v.* Cunningham, 1 Cal. 365; Myers *v.* Perry, 1 La. Ann. 372; Duggins *v.* Watson, 15 Ark. 118; Dunn *v.* McComb, 11 La. Ann. 325. In the late case of Dowell *v.* The Gen. Steam Nav. Co. 5 Ellis & B. 195, 32 Eng. L. & Eq. 158, Lord *Campbell*, C. J., said: "According to the rule which prevails in the Court of Admiralty in a case of collision if both vessels are in fault, the loss is equally divided; but in a court of common law the plaintiff has no remedy if his negligence, in any degree, contributed to the accident." See also, The Gen. Steam Nav. Co. *v.* Mann, 14 C. B. 127, 26 Eng. L. & Eq. 339, 341. The negligence of the plaintiff, in order to preclude him from recovering, must be such that the defendant could not, by ordinary care, have avoided the consequences of it. Butterfield *v.* Forrester, 11 East, 60; Bridge *v.* The Grand Junction Railway Co. 3 M. & W. 244; Davies *v.* Mann, 10 M. & W. 545. Lord *Campbell*, in the case of Gen. Steam Nav. Co. *v.* Tonkin, 4 Moore, P. C. 314, said that he entirely concurred in the principle established in these cases. See also, Tuff *v.* Warman, 2 C. B. N. S. 740.

[2] When the collision has evidently been caused by neglect, or the want of sufficient precaution, it is, perhaps, not yet settled whether the rule of equal apportionment should be applied, if the fault is inscrutable, and it is impossible to say which party is to blame. In The Catherine of Dover, 2 Hagg. Adm. 145, Sir *Chr. Robinson* made the following remarks to the Trinity Masters: "The result of the evidence will be one of three alternatives, either a conviction in your mind that the loss was occasioned by accident, in which case it must be sustained by the party on whom it has fallen; *or a state of reasonable doubt as to the preponderance of evidence, which will have nearly the same effect;* or third, a conviction that the party charged with being the cause of the accident is justly chargeable with the loss of this vessel according to the rules of navigation which ought to have governed them." The words in italics have, by a late writer on maritime law, (Flanders on Mar. Law, p. 298,) been supposed to determine, as the law of England, that where the fault is inscrutable, each shall bear his own loss. Whether the learned judge intended this construction to be put upon his words is, perhaps, doubtful. See Story on Bailments, § 609. The better rule seems to be that the loss in such a case shall be equally divided. 1 Bell's Com. 579; Pothier, Avaries, n. 155; 1 Emerig. Ass. ch. 12, § 14. In The Scioto, Daveis, 359, Mr. Justice *Ware* lays down the rule in the broadest terms. He says, the rule of equal apportionment "seems to apply in three cases, first, where there has been no fault on either side; second, where there may have been fault, but it is uncertain on which side it lies; and third, where there has been fault on both sides." And the rule of equal apportionment has been adopted in the District Court of the United States for the District of Ohio. Lucas *v.* Steamboat Swann, 6 McLean, C. C. 282. See also, The Nautilus, Ware, 2d ed. 529.

once said to be, in the case where both are in fault, that the loss should be apportioned between the parties, meaning according to the degree or measure of the fault of each, if either decidedly preponderates; but if they are equal, or nearly so, the whole damage is divided between both, without reference to their respective values. But, it seems now to be determined by adjudication, that the loss shall be divided equally.[1] Still, the equity power of the Court of Admiralty might qualify this rule, where the fault was vastly greater on one side than the other.[2] This rule has been held not to apply when both parties are wilfully in fault.[3] And even at common law, it is said the jury must take "an equitable view" of the facts and circumstances.[4] If a

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[1] Where both parties are to blame, the loss is equally apportioned between them, although one may be much more in fault than the other. Vaux *v.* Sheffer. 8 Moore, P. C. 75; The De Cock, 5 Month. Law Mag. 303, 2 Law Reporter, 311, 22 Am. Jurist, 464; The Seringapatam, 5 Notes of Cases, 61, 66, 2 W. Rob. 506, 3 id. 38; The Sappho, 9 Jurist, 560. In Hay *v.* Le Neve, 2 Shaw's Scotch Appeal Cases, 395, this question received a full and elaborate discussion, and a decision of the Court of Sessions, that the ship most to blame should pay two thirds of the expenses, *was reversed*. See also, The Judith Randolph, decided by Sir James Marriott, in 1789, cited in Hay *v.* Le Neve, *supra;* The Oratava, 5 Month. Law Mag. 45; The Victoria, 3 W. Rob. 49; The Montreal, 24 Eng. L. & Eq. 580; The Monarch, 1 W. Rob. 21; Gen. Steam Nav. Co. *v.* Tonkin, 4 Moore, P. C. 314; Lenox *v.* The Winisimmet Co., U. S. D. C., Mass., 11 Law Reporter, 80; The Scioto, Davcis, 359; Rogers *v.* The Rival, U. S. D. C., Mass., 9 Law Reporter, 28; Haskell *v.* The Kennedy, same court, April, 1857, not yet reported; Allen *v.* Mackay, same court, 16 Law Reporter, 686; The Nautilus, Ware, 2d ed. 529; Foster *v.* Schooner Miranda, 1 Newb. Adm. 227, 6 McLean, C. C. 221; Reeves *v.* Ship Constitution, Gilpin, 579. The rule has also been, recently, adopted by the Supreme Court of the United States. The Schooner Catherine *v.* Dickinson, 17 How. 170, 177; Rogers *v.* Steamer St. Charles, 19 How. 108. In the Southern District of New York the common law rule formerly prevailed. The Bay State, Abbott, Adm. 235.

[2] Mr. Justice *Hopkinson*, in Ralston *v.* The State Rights, Crabbe, 22, was of the opinion that the rule would not apply when the faults of the parties were *egregiously* unequal. And in a case of similar circumstances, a strict application of the rule would tend to encourage oppression and wrong. There is, however, no case where a different rule of apportionment has been adopted.

[3] Sturges *v.* Murphy, U. S. C. C., New York, Boston Courier, Sept. 19, 1857.

[4] See Smith *v.* Dobson, 3 Scott, N. R. 336. Concerning the justice of the rule there is a great diversity of opinion. Lord *Denman*, speaking of it, in De Vaux *v.* Salvador, 4 A. & E. 420, said: "It grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated by natural justice, nor possibly quite consistent with it." While Mr. Justice *Nelson*, in The Schooner Catherine *v.* Dickinson, 17 How. 170, 177, said of it: "Under the circumstances usually attending these disasters, we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in the navigation." Cleirac calls it

vessel has, by no voluntary action on her part, contributed to the collision, as where she is thrown against another vessel by the swell caused by a passing steamer, she is not liable.[1] We shall consider, hereafter, the question how far the owners are liable when the vessel is in charge of a pilot. It has been decided in England that if a vessel is employed by government, no action can be maintained against the owners for damages caused by a collision which took place in consequence of the positive orders of a commander in the royal navy under whose command she was.[2]

And where proprietors of docks are empowered to direct where a vessel shall be moored in a dock, and a penalty is imposed on all persons refusing to obey the orders of the dock-master, the vessel is not liable for damages caused by a collision, while being moved according to the dock-master's directions.[3] In England no ship is answerable beyond the value of herself and her freight;[4] and in this country similar statutes have been passed in some of the States, and there is a United States statute to the same effect.[5] If the cargo is injured by collision through any fault of the master, the shipper has an undoubted claim. If the collision occurred from the irresistible force of tide or storm, the ship is excused, because the loss was occasioned by a peril of the sea.[6] But if the collision occurred wholly

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a *judicium rusticum*. Us et Coustumes de la Mer, 68. Valin, on the contrary, thinks the rule just, and the most equitable one which could be adopted. Valin, liv. 3, tit. 7, des Avaries.

[1] Kissam *v.* The Albert, U. S. D. C., N. Y., Boston Courier, April 3, 1858, 21 Law Reporter, 41. The vessel injured in this case had been fastened along-side a brig, and rested against the anchor of the latter, which was catted on the starboard bow. The carrying the anchor in this way was prohibited by the harbor regulations of the port. The anchor ripped up the timbers of the vessel, but the court held that it was not the direct cause of the loss. So, where one vessel runs into another and causes it to come into collision with a third vessel, the second is not liable to the third if damage ensue, if it was not otherwise to blame. The Moxey, Abbott, Adm. 73.

[2] Hodgkinson *v.* Fernie, 2 C. B. N. S. 415, 40 Eng. L. & Eq. 306. It was also held, in this case, that they were liable if the injury was caused by negligence on the part of the master in adhering to the orders, if they were given in reference to an existing state of circumstances, and were not intended to apply to an emergency. And see Fletcher *v.* Braddick, 5 B. & P. 182.

[3] The Broeder Trow, 20 Eng. L. & Eq. 634.

[4] See post, ch. 11, § 3.

[5] See post, ch. 11, § 3.

[6] Buller *v.* Fisher, 3 Esp. 67.

through the fault of another vessel and most unnecessarily, but without any fault on the part of the ship which contains the damaged cargo, then the ship is not excused, whether there be a bill of lading or not, such collision being neither an act of God, or "a peril of the sea."[1] And if neither party be to blame, the defendant is liable if no bill of lading is given, because such collision would be neither an act of God nor of the public enemy.[2] As between an underwriter and the insured owner of a ship, the former will be answerable for a loss by a collision, although caused by the negligence of the master or crew, because it is considered as a peril of the sea; but a collision so occurring will not exempt the owner of the vessel from being liable to the shipper of goods for damage caused to them thereby.[3]

Generally, if a collision has happened, and one vessel had been guilty of some negligence, the burden is on her to prove that this negligence was not the cause of the collision;[4] and a

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[1] Marsh *v.* Blythe, 1 McCord, 360.

[2] In Plaisted *v.* Boston & Kennebec Steam Nav. Co. 27 Maine, 132, no bill of lading was given. The goods were damaged by a collision. No fault was imputable to either party, but as it was not caused by an act of God, or an inevitable accident, the defendants were held liable. But the court said that they would have been discharged, if a bill of lading had been given with an exception against perils of the sea. See also, Steamboat New Jersey, Olcott, Adm. 444, 448.

[3] Because no bailee, whether a common carrier or not, can limit his liability against loss arising from his own negligence. See Buller *v.* Fisher, 3 Esp. 67; Phillips *v.* Clark, 2 C. B. N. S. 156; Marsh *v.* Blythe, 1 McCord, 360; Jones *v.* Pitcher, 3 Stew. & P. 135; Whitesides *v.* Thurlkill, 12 Sm. & M. 599. In Duggins *v.* Watson, 15 Ark. 118, it was held that a shipper of goods on one vessel could not recover damages, caused by a collision with another, from the other vessel, unless the vessel on which his goods were shipped was entirely free from blame. See also, Simpson *v.* Hand, 6 Whart. 311; Otis *v.* Thom, 23 Ala. 469. In Harding *v.* Steamboat Maverick, U. S. D. C., Mass., 5 Law Reporter, 106, the vessel on which the libellant was employed as mate had run a warp across the track of a ferry-boat, for the purpose of removing her from one wharf to another. The ferry-boat ran against the warp, and the leg of the libellant was thereby broken. It appeared in evidence that the ferry-boat at the time was running without a license, and the court held that the libellant was entitled to recover. These cases proceed on the principle that a party by shipping goods on board a vessel, so identifies himself with that vessel that if it cannot recover for the damages done by the collision, he cannot. In England this has been applied to the case of a passenger on a steamboat. Cattlin *v.* Hills, 8 C. B. 123. See also, Thorogood *v.* Bryan, id. 115; Rigby *v.* Hewitt, 5 Exch. 240.

[4] Clapp *v.* Young, U. S. D. C., Mass., 6 Law Reporter, 111; Bulloch *v.* Steamboat

plaintiff in a cause of collision, must prove both care on his own part and want of it in the defendant.[1] Nor is it enough to show that it could not have been prevented at the moment, if it might have been by previous precautions.[2] Among these precautions it seems to be a kind of rule, but not perhaps established as law, that a ship lying in a river-way, or a stream, is bound to show a light. The subject has been a good deal discussed of late, and perhaps the best conclusion is, that in each case the circumstances must decide whether a light was necessary.[3] It is required by United States statutes in the case of

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Lamar, U. S. C. C., Georgia, 8 Law Reporter, 275; Waring *v.* Clarke, 5 How. 441, 465; The Brig Emily, Olcott, Adm. 132.

[1] Carsley *v.* White, 21 Pick. 254; Drew *v.* Steamboat Chesapeake, 2 Doug. Mich. 33; Lane *v.* Crombie, 12 Pick. 177; Bulloch *v.* Steamboat Lamar, *ut sup.*; Sills *v.* Brown, 9 Car. & P. 601; New Haven S. B. Co. *v.* Vanderbilt, 16 Conn. 420; Kennard *v.* Burton, 25 Me. 39; Rathbun *v.* Payne, 19 Wend. 399; Marriott *v.* Stanley, 1 Scott, N. R. 392; Raisin *v.* Mitchell, 9 Car. & P. 613; Bridge *v.* Grand Junction Railway Co. 3 M. & W. 244; Smith *v.* Dobson, 3 Scott, N. R. 336, 3 Man. & G. 59; Butterfield *v.* Forrester, 11 East, 60; Handaysyde *v.* Wilson, 3 Car. & P. 528; Vanderplank *v.* Miller, Moody & M. 169; Davies *v.* Mann, 10 M. & W. 546; Vennall *v.* Garner, 1 Cromp. & M. 21, 3 Tyrw. 85; Fashion *v.* Wards, 6 McLean, C. C. 152; The Bolina, 3 Notes of Cases, 208; The Steam Tug Wm. Young, Olcott, Adm. 38; The Steam Ferry-Boat Relief, id. 104; The Columbus, Abbott, Adm. 384.

[2] In the case of The Virgil, 7 Jur. 1174, 2 W. Rob. 201, 205, Dr. *Lushington* said: "If a vessel charged with having occasioned a collision, should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution, that would have rendered the accident less probable; it may undoubtedly be important that a voyage should be completed in the most speedy manner, but such speed must be combined with safety to other vessels sailing in an opposite course." See also, The Steamboat New York *v.* Rea, 18 How. 223, 224; The Clement, 2 Curtis, C. C. 363.

[3] Whether a vessel must have a light or not, is generally a question of fact, to be decided by all the evidence in each particular case, whether the omission of a light constituted negligence. Thus Dr. *Lushington* in the Rose, 2 W. Rob. 4, said: "It has been discussed over and over again in former cases of this kind, and I believe there is no occasion in which it has been laid down as a general principle that merchant vessels ought constantly to carry lights. Under certain circumstances undoubtedly it may be right and expedient to do so." Similar language is used by him in the case of The Swea, 4 Notes of Cases, 97, note; and in that of The Sarah, 4 Notes of Cases, 98, note. He cited and affirmed the above also in The Iron Duke, 2 W. Rob. 377. In this case a large steamer, on a dark night, in a part of the channel constantly navigated by vessels, ran into and sunk a brig. The latter had no lights. It was held that she was not bound to carry lights, and that the steamer was to blame in going at full speed on such a night in such a locality. This decision seems hardly consistent with that of The Victoria, decided by the learned judge a few years later, and reported in 3 W. Rob. 49.

certain steamboats;[1] and in New York it is required of boats

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In that case a vessel at anchor without a light was run into. Dr. *Lushington*, addressing the Trinity Masters, said: "If you are of opinion that the carrying and exhibiting such a light would have tended to prevent the collision, I cannot but think that it was a duty imposed upon him to have done so, and for this reason, that all persons are bound to take due and proper care to avoid an accident, and no man can justly complain of an accident that happens to himself, if by reasonable care and proper precaution he could have prevented it." The Trinity Masters were of opinion that, looking to the period of the year, the state of the night, and the number of vessels likely to be in the neighborhood of her, it was her duty, under such a combination of circumstances, to have had a light burning. See also, The Scioto, Davcis, 359; Lenox *v.* The Winisimmet Co. U. S. D. C., Mass., May, 1848, 11 Law Reporter, 80. In Kelly *v.* Cunningham, 1 Cal. 365, it was held that if ordinary prudence required a vessel, lying in the roadstead of San Francisco, to carry a light, a general custom for vessels in the harbor to neglect to do so was no excuse. See also, Innis *v.* Steamer Senator, 1 Cal. 459. And in The Indiana, Abbott, Adm. 330, and Hain *v.* Steamboat North America, U. S. D. C., South. Dist. of N. Y., 2 N. Y. Leg. Obs. 67, it was held that a vessel at anchor in the harbor, or in a navigable river, must show a light. See also, Rogers *v.* Steamer St. Charles, 19 How. 108. In this case the light had been taken down just previous to the collision, in order that the water which had collected on the glass globe might be wiped off. The vessel was nevertheless held to be in fault. In Carsley *v.* White, 21 Pick. 254, the court instructed the jury that whether the plaintiffs ought to have had a light or not, depended on all the circumstances of the case. The vessel was lying in the harbor of Provincetown. See also, The New Haven Steamboat Co. *v.* Vanderbilt, 16 Conn. 420, 429. It was also held in The Santa Claus, 1 Blatchf. C. C. 370, that, where a vessel on a dark night, the weather being thick and cloudy, carried but one light, and thereby led those on board of another vessel to suppose that she was at anchor, and a collision consequently took place, the vessel was guilty of negligence. The necessity of having a light was strongly enforced by Mr. Justice *Grier*, in the case of The Barque Delaware *v.* Steamer Osprey, 2 Wallace, C. C. 268, 275. The Osprey ran into the barque Delaware; the steamer had lights but the barque had not. Mr. Justice *Grier* said: "The court cannot establish any rule to bind vessels navigat-

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[1] Stat. 1838, ch. 191, § 10; 5 U. S. Stats. at Large, 306. This statute applies to steamboats generally. That of 1849, ch. 105, § 5; 9 U. S. Stats. at Large, 382, prescribes the rules for steamboats and sailing vessels on the northern and western lakes. If a vessel disregard the provisions of these statutes, the burden is on her to show, in case of a collision, that the accident was not owing to such neglect. Bulloch *v.* Steamboat Lamar, U. S. C. C., Georgia, 1844, 8 Law Reporter, 275; Foster *v.* The Sch. Miranda, 1 Newb. Adm. 227; 6 McLean, C. C. 221. See also, Lawson *v.* Carr, Privy Council, 19 Law Reporter, 100. But if the accident is not owing in any degree to the absence of the light, the vessel will not be considered in fault in this respect. New Haven S. B. Co. *v.* Vanderbilt, 16 Conn. 420; Griswold *v.* Sharpe, 2 Cal. 17; The Santa Claus, Olcott, Adm. 428; The Panther, 24 Eng. L. & Eq. 585; Morrison *v.* The Gen. Steam Nav. Co. 8 Exch. 733, 20 Eng. L. & Eq. 455; Mackay *v.* Roberts, 9 Moore, P. C. 357. The act of 1849 provides that vessels "going off large," or before the wind, or at anchor, must show a white light. It has been held that a vessel under way with the wind abaft the beam is "going off large." Hall *v.* The Buffalo, 1 Newb. Adm. 115.

in the canals, and the want of such light is evidence of negli-

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ing the high seas, after night, to carry signal lights; but when one party does this, and the other does not, we can and will treat (in a case *cæteris paribus*) the dark boat as the wrongdoer." And Mr. Justice *Kane*, in the same case, said: "I should be very glad to follow in the wake of the first admiralty judge, who would hold the absence of a properly placed, and well trimmed lantern, to be *primâ facie* evidence of a culpable want of caution." See also, Jacobsen's Sea Laws, 340. *Gibson*, C. J., in Simpson *v.* Hand, 6 Whart. 311, 324, said: "Indeed, the hoisting of a light is a precaution so imperiously demanded by prudence, that I know not how the omission of it could be qualified by circumstances any more than could the leaving of a crate of china in the track of a railroad car, or how it could be considered otherwise than as negligence *per se*." See also, The Oratava, 5 Month. Law Mag. 45; The Columbine, 2 W. Rob. 27, 33; Steamboat Blue Wing *v.* Buckner, 12 B. Mon. 246; Ward *v.* Armstrong, 14 Ill. 283. In Culbertson *v.* Shaw, 18 How. 584, Mr. Justice *McLean* states the law, as follows: "Where a boat is anchored in the path of vessels, a light is indispensable; but it is not required where the boat is fastened to the shore, especially at a place set apart for such boats." See also, Ure *v.* Coffman, 19 How. 56. In the case of Brainerd *v.* Steamer Worcester, U. S. D. C., Conn., Boston Daily Advertiser, Sept. 12, 1856, Mr. Justice *Ingersoll* held, "that by the maritime law, a vessel lying at anchor in a track frequented by other ships is bound to exhibit an *efficient* light, an *effective* light, sufficient to warn other vessels approaching, of the position in which she is anchored. That a light hung in the larboard forerigging of a vessel at anchor, with her sails up, and so as to be obscured and eclipsed by the sails, from the view of a steamer approaching on the starboard side, so far as respects such steamer so approaching, is no sufficient light within the meaning of the maritime law." In The Thomas Martin, U. S. C. C., N. Y., 19 Law Reporter, 379, Mr. Justice *Nelson* held, that even if vessels were not bound to carry lights generally, still when approaching each other they were bound so to do. And in Pope *v.* Steamer R. B. Forbes, U. S. D. C., Mass., Mr. Justice *Sprague* used the following language: "Now there is no imperative rule that a sailing vessel must show a light. Yet if a schooner in the night time, going where steamers may be expected to be met, fails to show a light, she ought not to recover for damages done by collision with a steamer, if the steamer keeps a good look-out and uses reasonable exertions to prevent a collision." See also, the language of *Ware*, J., in The Steamer City of New York, U. S. D. C., Mass., Boston Courier, Dec. 10, 1857. But see The Pilot Boat Blossom, Olcott, Adm. 188; The Steamboat Neptune, id. 483. In New York & Virginia Steamship Co. *v.* Calderwood, 19 How. 241, which was a case of a collision between a sailing vessel and a steamer, the sailing vessel had no light. The court were of opinion, upon the evidence in the case, that this did not indicate negligence, but said: "But that the case may not be misunderstood, we assert that the ruling principle of the court is, that an obligation rests upon all vessels found in the avenues of commerce to employ active diligence to avoid collisions, and that no inference can be drawn from the fact, that a vessel is not condemned for an omission of certain precautionary measures in one case, that another vessel will be excused, under other circumstances, for omissions of the same description." In Valentine *v.* Cleugh, 8 Moore, P. C. 167, 29 Eng. L. & Eq. 49, it was held that, where an admiralty regulation, made pursuant to the 14 and 15 Vict. c. 79, prescribed that all sailing vessels at anchor should exhibit a constant bright light at the masthead, between sunset and sunrise, a light in the larboard mizzen rigging was not sufficient, it being not so readily seen there as in the place prescribed. See also, The Mangerton, 2 Jur. N. S. 620, 27 Law

gence.[1] Sailing vessels when under way,[2] as well as when at anchor,[3] should have a sufficient watch or look-out on deck. If ships are approaching each other, the one going free must get out of the way of the one that is close-hauled.[4] If both are close-hauled,

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T. 207; Whittel *v.* Crawford, Exch., 37 Eng. L. & Eq. 466. But in Mackay *v.* Roberts, 9 Moore, P. C. 357, a schooner of 116 tons burden exhibited a light in a lantern, with a candle of eight to the pound, which was hung at the forestay, four or five feet above the deck. There was also a binnacle light. This was held a sufficient compliance with the regulation imposing a duty on "sailing vessels approaching or being approached by any other vessel, to show a bright light in such a position as can be seen by such vessel, and in sufficient time to avoid the collision." A "bright light" was held to be such a light as vessels of the same class as the one in question usually carried. — The light must not only be shown, but continued, until the danger is past. Dowell *v.* The Gen. Steam Nav. Co. 5 Ellis & B. 195, 32 Eng. L. & Eq. 158. If the fact of there not being lights is not noticed in the pleadings and arguments, the court will take notice of it, and neither party can recover. The Aliwal, 25 Eng. L. & Eq. 602.

[1] See Rathbun *v.* Payne, 19 Wend. 399. There is also a statute which provides that steamboats shall carry lights. See Fitch *v.* Livingston, 4 Sandf. 492; The Santa Claus, Olcott, Adm. 428, 1 Blatchf. C. C. 370. In Fitch *v.* Livingston, it was held, that a steam propeller licensed as a coaster, going up the Hudson, on a voyage from Philadelphia to Albany, was bound to comply with the laws of the State through whose waters she was passing. In The Santa Claus, which was a similar case, the vessel was held to be in fault in not carrying two lights, not so much on the law of the State as on a usage of the river. In Halderman *v.* Beckwith, 4 McLean, C. C. 286, it was held that a State had no power to pass a law regulating the mode in which vessels should pass each other on waters within the limits of the State, when the vessels did not belong to the State. This case was carried up to the Supreme Court of the United States, and that court was equally divided. It has been held in a recent case, that the statutes of a State only apply to cases which come before the courts of the State, and that in a case before the Federal courts, which administer the general admiralty law, they will not be regarded. The vessel which disregarded the statute was a foreign ship, at anchor at the time of the collision in the port of New York. Steamboat New York *v.* Rea, 18 How. 223. An exception to the general rule thus laid down is stated by the learned court to be that the States have the right to pass laws regulating vessels while in the harbors and ports of a State. But this seems inconsistent with the decision.

It is provided also in Vermont, that vessels on Lake Champlain shall carry lights. Rev. Stats. of Vermont, tit. xxii. ch. 92, p. 422.

[2] The Brig Emily, Olcott, Adm. 132; The Pilot Boat Blossom, id. 188; The Rebecca, 1 Blatchf. & H. Adm. 347; The Clement, 2 Curtis, C. C. 363, 369; The Chester, 3 Hagg. Adm. 316. But it has been held not to be improper conduct on the part of the officer of the deck to take the helm himself and to trust the look-out to a common sailor. The Pilot Boat Blossom, *supra*.

[3] The Indiana, Abbott, Adm. 330. But if the collision was not owing to the absence of a watch, the vessel will not be considered in fault. Mellon *v.* Smith, 2 E. D. Smith, 462.

[4] Sills *v.* Brown, 9 Car. & P. 601; The Gazelle, 2 W. Rob. 515; The George, 5 Notes of Cases, 368; The Woodrop-Sims, 2 Dods. 83; The Speed, 2 W. Rob. 225; Jame-

each should go to the right; or the ship on a starboard tack keeps on, while the ship on the larboard tack changes her course.[1] If both are going the same way, it is said that the ship to windward is to keep away; but this is manifestly incorrect, and there is need of further adjudication to determine the true rule.[2] If

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son *v.* Drinkald, 12 Moore, 148; The Harriett, 1 W. Rob. 182; The Rose, 2 W. Rob. 1; The Baron Holberg, 3 Hagg. Adm. 244; Mackay *v.* Roberts, 9 Moore, P. C. 357; Handaysyde *v.* Wilson, 3 Car. & P. 528; Vennall *v.* Garner, 1 Cromp. & M. 21, 3 Tyrw. 85; The Chester, 3 Hagg. Adm. 316; The Rebecca, 1 Blatchf. & H. Adm. 347; Allen *v.* Mackay, U. S. D. C., Mass., Dec. 1853, 16 Law Reporter, 686; The Clement, same court, Oct. 1854, 17 Law Reporter, 444; affirmed in Circuit Court, 2 Curtis, C. C. 363; The Clara M. Porter, U. S. D. C., Mass., Jan. 1856, 18 Law Reporter, 678; The Brig Emily, Olcott, Adm. 132; The Pilot Boat Blossom, id. 188; The Sloop Argus, Id. 304.

[1] The Jupiter, 3 Hagg. Adm. 320; Jameson *v.* Drinkald, 12 Moore, 148; The Brig Cynosure, U. S. D. C., Mass., 7 Law Reporter, 222; The Lady Anne, 1 Eng. L. & Eq. 670; The Commerce, 3 W. Rob. 287; Bark St. John *v.* Bark Mary Bannatyne, Vice Adm. Court, Lower Canada, 18 Law Reporter, 528; The John Brotherick, 8 Jur. 276; The Alexander Wise, 2 W. Rob. 65. And it is the duty of the vessel on the larboard tack to give way at once, without considering whether the other vessel be one or two points to leeward. The Traveller, 2 W. Rob. 197. The general rule only applies when the two vessels are directly opposing each other, and not when the heads of the respective vessels are lying in different directions. The London Packet, 2 W. Rob. 213. It was held in The Ann & Mary, 2 W. Rob. 189, that in doubtful circumstances, where there is a probability of a collision, a vessel on the larboard tack, although close-hauled, is bound to give way to a vessel on the starboard tack, notwithstanding the latter may have the wind free.

The 296th section of the Merchants Shipping Act, 17 and 18 Vict., provides that when any ship, whether a steam or sailing ship, proceeding in one direction, meet another proceeding in another direction, so as to involve the risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other, whether the vessels be on the port or starboard tacks, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger; and subject also to the proviso, that due regard shall be had to the dangers of navigation, and as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command. In a case that came up under this section, the court held that the term close-hauled in the former part of the section, meant that the ship might be brought a little nearer to the wind, and that if she could not go any nearer without the command over her being lost, she was not obliged to port her helm. Chadwick *v.* City of Dublin Steam-Packet Co. 6 Ellis & B. 771, 38 Eng. L. & Eq. 107.

[2] It is laid down by Chancellor *Kent*, (3 Kent, 230,) and in a note to Abbott on Shipping, p. 234, by one of the American editors, and in Flanders on Maritime Law, 307, that where two vessels are going the same course in a narrow channel, and there is danger that they will run afoul of each other, the vessel to the windward is to keep away. For this position Marsh *v.* Blythe, 1 McCord, 360 is cited. That this cannot always be correct, is manifest on a slight examination of the meaning of the term "keep away." For, if two vessels are going the same way, on the same

two sailing vessels are approaching each other with the wind free, each goes to the right.[1]

The rule is the same of two steamboats approaching each other.[2] Since steamboats can go almost equally well in one

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tack, but converging, so that if they should keep on, a collision would ensue, if the vessel to windward should keep away, that is, keep away before the wind, she would be thrown directly in the track of the other vessel. Nor is the case of Marsh *v.* Blythe an authority in point. The head note does not state the case correctly. Two vessels were bound to Charleston, one, at the time of the collision, was on the starboard tack, and the other on the larboard. It was held that the latter should have given way. It will be readily seen that this is merely an exemplification of the rule, given above, that when two vessels close-hauled are approaching, the vessel on the larboard tack is to change her course. The head note of the case of Steamboat Co. *v.* Whilldin, 4 Harring. Del. 228, is also incorrect. In that case two steamboats going in opposite directions came into collision. There is not even a *dictum* in the opinion of the court in regard to the duty of vessels going in the same direction, though the rules of navigation, as given by Kent, are incorporated into the head note. The question came before the District Court of the United States for the District of Massachusetts in the case of The Clement, 17 Law Reporter, 444. A brig and a pilot boat, schooner rigged, were sailing on the same tack, on converging courses. The brig was to windward and had the wind two points free. The pilot boat was close-hauled. The two vessels kept their respective courses, and the pilot boat, being the faster sailer, overtook the brig and struck her on the lee bow. The court applied the rule applicable to vessels approaching each other, and held that the brig, having the wind free, should have avoided the pilot boat. It was also said that if both had been close-hauled, and the convergency had been caused by the schooner's being able to lie nearer the wind, the brig would not have been in fault. This case was affirmed in the Circuit Court. 2 Curtis, C. C. 363. An appeal was taken to the Supreme Court, and the case argued, and that court were equally divided.

We are unable to see, so clearly as we could desire, that the decisions in the district and circuit courts are altogether correct. It seems to have been taken for granted that the general rule as to vessels approaching each other applied to the case of a vessel astern, and the faster sailer overhauling and running into the other. If such a proceeding may be justified by the fact that the one astern was close-hauled, and the one ahead had the wind free, then it would seem to follow that, on the road, a carriage might run into one ahead, and justify itself by saying that it had kept to the right "as the law directs."

If two steamboats are going in the same direction, the one ahead is entitled to keep her course, and the one astern, if she attempts to pass, must avoid a collision. The Rhode Island, Olcott, Adm. 505, affirmed 1 Blatchf. C. C. 363; The Governor, Abbott, Adm. 108. See also, Ward *v.* Sch. Donsman, 6 McLean, C. C. 231. And the same rule has been applied where the one ahead was a sailing vessel, and the one astern was towed by a steamer. The Carolus, 2 Curtis, C. C. 69.

[1] Lowry *v.* Steamboat Portland, 1 Law Reporter, 313, 315; St. John *v.* Paine, 10 How. 557; The City of London, 4 Notes of Cases, 40.

[2] The Steamboat Washington, U. S. D. C., *Ingersoll*, J., 12 N. Y. Leg. Obs. 163; Wheeler *v.* The Eastern State, 2 Curtis, C. C. 141; The Santa Claus, Olcott, Adm. 428, 1 Blatchf. C. C. 370; Lockwood *v.* Lashell, 19 Penn. State, 344. In Ward *v.* The

direction as in another, they are considered as vessels with a free wind. They have great power and speed, and are always obliged to observe a great degree of caution, particularly at night. They must be very watchful as to their speed and course. In regard to the former, it is a question of fact in each particular case whether the speed was excessive or not; and in determining this, the locality and hour, the state of the weather, and all circumstances of a similar nature, are to be fully considered.[1] It has been held to be no excuse for an excessive speed, that the steamer could not otherwise fulfil a contract for the carriage of the mail.[2] If a steamboat, in consequence of excessive speed, raises so great a swell that a vessel is sunk thereby, the owners are liable.[3] A steamer, when hailed in a fog, should reverse her engines and stop her headway as much as possible.[4] The same precautions should be taken when a vessel is seen, but her course is doubtful.[5] In respect to a look-out, it is not enough that a person is stationed in the pilot-house for that purpose, but a vigilant watch should be stationed in the forward part of the steamer, so situated as to be able to discern

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Ogdensburgh, 1 Newb. Adm. 139, it was held, that the rule did not apply where, if each should keep its course, there would be no possibility of a collision. But in Wheeler *v.* The Eastern State, *supra*, it was held not to be enough for the party who departs from the rule to show that they would not have gone clear, but he must show that the other party ought to have perceived there was no probable chance of collision by so doing. See p. 202, note 2.

[1] The Europa, 2 Eng. L. & Eq. 557, 564; The Northern Indiana, 16 Law Reporter, 433; The Gazelle, 2 W. Rob. 515; The Iron Duke, 2 W. Rob. 377; The Virgil, 2 W. Rob. 201; The Bay State, Abbott, Adm. 235, s. c. *nom.* McCready *v.* Goldsmith, 18 How. 89; Steamboat New York *v.* Rea, 18 How. 223; Brainerd *v.* Steamer Worcester, U. S. D. C., Conn., Boston Daily Advertiser, Sept. 12, 1856; Rogers *v.* Steamer St. Charles, 19 How. 108. If the by-laws of a place forbid vessels going over a certain rate of speed in the adjacent waters, it is no excuse in case of collision that the colliding vessel was going at a rate within the limits of the rule, if such rate were dangerous at the time. Netherlands Steamboat Co. *v.* Styles, Privy Council, 40 Eng. L. & Eq. 19, 25.

[2] The Rose, 2 W. Rob. 1; The Northern Indiana, 16 Law Reporter, 433; Rogers *v.* Steamer St. Charles, 19 How. 108, 112.

[3] Netherlands Steamboat Co. *v.* Styles, Privy Council, 40 Eng. L. & Eq. 19. See also, Smith *v.* Dobson, 3 Man. & G. 59, where the damage was caused partly by the swell of a steamer which had already passed, and the defendant was held liable.

[4] The Perth, 3 Hagg. Adm. 414.

[5] The Birkenhead, 3 W. Rob. 75; The James Watt, 2 W. Rob. 270; The Northern Indiana, 16 Law Reporter, 433, 447; Ward *v.* The Ogdensburgh, 1 Newb. Adm. 139.

vessels at the earliest moment.[1] When a steamer meets a sailing vessel close-hauled, the sailing vessel must keep on her course and the steamer must avoid her if there is danger of a collision,[2] and according to the American rule the steamer may go either to the right or left of a sailing vessel with the wind free, but this rule is objectionable in some respects, and we think the English rule, requiring her to go to the right, is to be preferred.[3]

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[1] St. John *v.* Paine, 10 How. 557, 585; Newton *v.* Stebbins, 10 How. 586; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443; The Northern Indiana, 16 Law Reporter, 433, 447; Ward *v.* The Ogdensburgh, 1 Newb. Adm. 139; The Steamboat New York *v.* Rea, 18 How. 223; Goslee *v.* Shute, id. 463; Netherlands Steamboat Co. *v.* Styles, Privy Council, 40 Eng. L. & Eq. 19. In the case of The Europa, 2 Eng. L. & Eq. 557, it was held, that a steamer going at the rate of twelve and a half knots an hour in a dense fog, seven hundred miles from land, must have the most complete look-out that can be adopted. It was in evidence that the usual look-out in cases of difficulty, and of dense fog, was an officer on the foremost bridge, another at the con, a quarter-master at the wheel, and a second hand in the wheel-house, and lastly, two look-outs on the top-gallant forecastle. In the present case the look-outs being, merely, one on the bridge, a quarter-master on the top-gallant forecastle, one at the wheel, and another at the con; it was held, that no sufficient look-out was kept. See also, ante, p. 195, note 1. In The Wirrall, 3 W. Rob. 56, the Trinity Masters were of opinion, that the proper place for the master, or look-out man on a ferry-boat on the river Mersey, was the bridge between the paddle-boxes. See also, generally, The George, 4 Notes of Cases, 161; Jameson *v.* Drinkald, 12 Moore, 148; The Shannon, 2 Hagg. Adm. 173; The Columbine, 2 W. Rob. 27.

[2] The Gazelle, 2 W. Rob. 515; St. John *v.* Paine, 10 How. 557; Newton *v.* Stebbins, id. 586; Lowry *v.* Steamboat Portland, 1 Law Reporter, 313; Hawkins *v.* Dutchess & Orange S. B. Co. 2 Wend. 452; The Genesee Chief *v.* Fitzhugh, 12 How. 443; Sanderson *v.* Columbus, 10 Phil. L. J. 268, 8 Leg. Int. 31; Lyle *v.* The Conestoga, 11 Phil. L. J. 183, 8 Leg. Int. 154; Mellon *v.* Smith, 2 E. D. Smith, 462; The Steam Tug Wm. Young, Olcott, Adm. 38; The Steamboat Narragansett, Olcott, Adm. 246; The Steamboat New Jersey, id. 415; The Steamboat Neptune, id. 483; The Washington Irving, Abbott, Adm. 336. The sailing vessel is, however, only obliged to keep her course when there is some immediate danger of collision. The Propeller Monticello *v.* Mollison, 17 How. 152; Peck *v.* Sanderson, id. 178.

[3] We have seen that, when two sailing vessels going free meet, each must pass to the right; and as a steamer is considered in the light of a vessel going free, it would seem to follow that when she meets a sailing vessel free, the same rule should apply. And it was so held by Dr. *Lushington*, in the case of The City of London, 4 Notes of Cases, 40. The rule, as laid down by him, has been followed by the Vice Admiralty Court of Lower Canada, in the case of The Inga, decided July 3, 1855, 18 Law Reporter, 285, and is supported by a writer in the London Law Magazine, vol. 53, p. 52. It is now by statute the settled law of England. The Merchants Shipping Act of 17 & 18 Victoria, § 296; The Mangerton, 2 Jur. N. S. 620, 27 Law T. 207. Mr. Justice *Sprague*, on the other hand, in the case of The Osprey, U. S. D. C., Mass., 17 Law Reporter, 384, decided that in such a case the sailing vessel was bound to keep on her course, and the steamer could go either to the right or to the left to avoid her. This decision proceeds on the ground that wherever an inequality exists, the vessel having the advan-

Generally, a steamer going on a customary route should keep in her usual track.[1] When a sailing vessel is drifting with the current, it is the duty of a steamboat to avoid her, although the latter is in the usual track for steamboats.[2] If a collision ensue between two steamboats at their place of departure, both leaving the same slip at the same time, both will be considered to be in fault. But if one starts first, the other must wait till the former gets under way.[3] And if the boats are running in opposition to each other, both will be presumed to be in fault, unless it is clearly shown that one is not to

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tage is to keep out of the way, and the other must keep on her course. He says the expression that a steamer is considered as a vessel with the wind free is only applicable to the case of steamers meeting vessels close-hauled. He also cites four cases as bearing on the point. St. John *v.* Paine, 10 How. 557; Newton *v.* Stebbins, id. 586; The Leopard, Daveis, 193; The Northern Indiana, 16 Law Reporter, 433. The Leopard, perhaps, supports the position contended for, but the others are cases of steamers and vessels close-hauled. There is a *dictum* of Mr. Justice *Nelson*, in St. John *v.* Paine, to the effect that a steamer is always to avoid a sailing vessel, whether close-hauled or with the wind free. For this several English cases are cited, but none of them support that branch of the proposition relating to vessels with the wind free. This *dictum* is cited with approbation in the case of The Northern Indiana, and is supported by an article in the Law Reporter, vol. 18, p. 181. The rule established by Dr. *Lushington* seems to rest on the principle (which appears to be reasonable), that the inequality between a steamer and a vessel going free, provided she be not on a tack, is in reality so little, that it does not counterbalance the propriety and superior advantages of each doing its part to avoid the collision. In accordance with this view it was held, in Ward *v.* Armstrong, 14 Ill. 283, in a case of collision between a steamboat and a schooner, that as the latter was running large before the wind, she was nearly as much in command as the steamer, and as she saw the latter several miles off, and might have given her a wide berth, the law would not consider the steamer in fault, since there was reasonable care on her part. See also, The New Champion, Abbott, Adm. 202. But in a recent case, before the Supreme Court of the United States, the law as laid down by Mr. Justice *Sprague* has been established. The Steamer Oregon *v.* Rocca, 18 How. 570. The court put their decision entirely on the ground that the general rule of law is, that a steamer, meeting a sailing vessel, must avoid her, and that when a general rule is laid down, it is practically rendered ineffectual by admitting exceptions to it. A collision occurred on Long Island Sound during the summer of 1857, which illustrates the superiority of the English, to the American rule. Two steamers were approaching each other in the night time, and one was thought to be a sailing vessel; consequently, the other, in the exercise of its privilege, went to the left, but as the first went to the right they came into collision. Had the English rule been observed, the misapprehension on the part of the steamer would have been productive of no ill results.

[1] New York & Virginia Steamship Co. *v.* Calderwood, 19 How. 241.

[2] Saune *v.* Tourne, 9 La. 428; Fretz *v.* Bull, 12 How. 466. See also, Fashion *v.* Wards, 6 McLean, C. C. 152; Ward *v.* The Sch. Dousman, id. 231.

[3] The Steamboat Boston, Olcott, Adm. 407.

blame.[1] Evidence that a boat was racing is admissible to show negligence on her part.[2] It has been held that if a raft is driven by the wind into the channel of a river so as to obstruct it, the master of a steamboat has no right to destroy it, as being a nuisance, if it has not remained there an unreasonable time and exertions are being made to remove it by the owners of it.[3]

When a vessel is entering a harbor, she is bound to exercise great care and diligence.[4] The ordinary rules of navigation are binding upon vessels meeting pilot boats;[5] and also on vessels in the fishing business, on their fishing grounds.[6] A ferry-boat plying across a navigable river is bound to remain in her slip, notwithstanding her regular hour of leaving has arrived, if any vessel is seen, or is in a position to be seen, from on board of her, with which she will be in danger of coming into collision if she goes out; but she is not bound to lie waiting the expected arrival of another vessel.[7] If a ship at anchor and one in motion come into collision, the presumption is, that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been.[8] The rule of law would seem to be the

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[1] The Steamboat Boston, Olcott, Adm. 407.

[2] Myers *v.* Perry, 1 La. Ann. 372.

[3] Lallande *v.* Steamboat C. D. Jr. 1 Newb. Adm. 501.

[4] Culbertson *v.* Shaw, 18 How. 584, 587; Ward *v.* The Sch. Dousman, 6 McLean, C. C. 231.

[5] The Clement, 2 Curtis, C. C. 363; The Pilot Boat Blossom, Olcott, Adm. 188.

[6] The Sch. Summit, 2 Curtis, C. C. 150.

[7] The Columbus, Abbott, Adm. 384. See also, Randolph *v.* The United States, 1 Newb. Adm. 497.

[8] The Lochlibo, 3 W. Rob. 310, 1 Eng. L. & Eq. 651. In this case the Lochlibo came into collision with a vessel at anchor. Dr. *Lushington* said: "As the Lochlibo ran into a vessel which was incapable of helping herself, it is her duty to prove, in order to exonerate herself from the blame, that the collision arose from circumstances which it was utterly out of her power to prevent, or that it was the fault of the pilot on board, or that it arose from the default of those on board the Aberfoyle." "*Primâ facie*, as was properly and wisely admitted by the counsel, the Lochlibo is to blame for having run down a vessel at anchor." See also, The George, 9 Jur. 670; The Massachusetts, 1 W. Rob. 371; The Batavier, 10 Jur. 19, 4 Notes of Cases, 356; s. c. *nom.* Netherlands Steamboat Co. *v.* Styles, 9 Moore, P. C. 286; The Scioto, Daveis, 359; The Victoria, 3 W. Rob. 49; The Girolamo, 3 Hagg. Adm. 169, 173; The Eolides, 3 Hagg. Adm. 367; Culbertson *v.* Shaw, 18 How. 584; Steamboat New York *v.* Rea, 18 How. 223; Dunn *v.* McComb, 11 La. Ann. 325. If a vessel anchor in an improper place, she must take the consequences. Strout

same where a vessel aground is run into.[1] When a vessel has been sunk in a navigable river the owner is bound to use reasonable care to remove it, but if he is unable so to do, he may abandon his possession or right of possession and is not thereafter liable for injuries sustained by vessels in striking against the wreck.[2]

In general, established rules and known usages should be carefully followed; for every vessel has a right to expect that every other vessel will regard them; but not where they would, from peculiar circumstances, certainly cause danger, as if a vessel near a rock or shore must strike it by putting her helm to port, which the *general* rule might require; and no vessel is justified by a pertinacious adherence to a rule, for getting into collision with a ship which she might have avoided.[3] And the ship that is

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v. Foster, 1 How. 89; The Scioto, Daveis, 359. But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her if it be practicable, and consistent with her own safety. Per Dr. *Lushington* in the case of The Batavier, 10 Jur. 19. See also, Cummins *v.* Spruance, 4 Harring. Del. 315; Knowlton *v.* Sanford, 32 Maine, 148. If a vessel is at anchor another must not anchor so near as to cause damage to her. Griswold *v.* Sharpe, 2 Cal. 17; The Volcano, 2 W. Rob. 337, 3 Notes of Cases, 210. In this case the vessel had taken due precautions against ordinary perils, and no accident would have occurred but for a hurricane, which drove her from her moorings, and caused the collision. She was held liable. And if a vessel is moored along-side of another at a wharf, she is responsible for all injuries resulting from her proximity which human skill or precaution could have guarded against. Vantine *v.* The Lake, 2 Wallace, C. C. 52. See also, Steamboat United States *v.* Mayor, 5 Mo. 230; Inman *v.* Funk, 7 B. Mon. 538; Beane *v.* The Mayurka, 2 Curtis, C. C. 72; The Bark Lotty, Olcott, Adm. 329.

[1] Kelsey *v.* Barney, 2 Kern. 425. In this case a vessel lay aground across the channel of a harbor where vessels had never before been known to ground or obstruct the passage, and not being discovered was run into; held, that the defendant was not necessarily in fault, although those in charge of his vessel, by their utmost vigilance, might have seen the plaintiff's vessel in time to have stood off. The question was held to be, whether on all the facts of the case the defendant was guilty of negligence.

[2] White *v.* Crisp, 10 Exch. 312, 26 Eng. L. & Eq. 532. It was also decided in this case that the liability of the owner passed to the vendee by a sale of the wreck, and that a plea that the wreck was lying in a part of a navigable channel, which was not ordinarily passed over by vessels, except during stress of weather, was bad.

[3] Allen *v.* Mackay, U. S. D. C., Mass., 1853, 16 Law Reporter, 686; The Vanderbilt, Abbott, Adm. 361; The Friends, 1 W. Rob. 478, 485, 7 Jur. 307. In The Commerce, 3 W. Rob. 287, it was held that where there is a probability of a collision, a vessel, on the larboard tack, and close-hauled, is not justified in pertinaciously keeping on her course, although the vessel she meets is on the starboard tack, and with the wind free. Where practicable, she is bound to take the necessary precautions for avoiding the collision, although the other vessel is acting wrongfully in not giving way in

not disabled is bound to render all possible assistance to the other, although that other may be alone in fault.[1] It has been held, that in case of collision between two American vessels in a foreign port, the rights of the parties will depend, even in an action in this country, upon the law of the place where the collision took place.[2]

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time. See also, Bark St. John *v.* Bark Mary Bannatyne, Vice Adm. Court, Lower Canada, 18 Law Reporter, 528, 531; The Hope, 1 W. Rob. 154, 156; The Niagara, Vice Adm. Court, Lower Canada, June 2, 1854, 17 Law Reporter, 336, 341; The Lady Anne, 1 Eng. L. & Eq. 670; The Shannon, 2 Hagg. Adm. 173; Lowry *v.* Steamboat Portland, 1 Law Reporter, 313; St. John *v.* Paine, 10 How. 557; Moore *v.* Moss, 14 Ill. 106; Hawkins *v.* Dutchess & Orange S. Boat Co. 2 Wend. 452; Minor *v.* Ship Astracan, 2 Whart. Dig. 685; Foster *v.* The Sch. Miranda, 1 Newb. Adm. 227, 6 McLean, C. C. 221; The Santa Claus, Olcott, Adm. 428; Handaysyde *v.* Wilson, 3 Car. & P. 528. In the case of The Blenheim, 10 Jur. 79, a steamer was run into by a vessel being launched. It was held, that as the steamer might have avoided the collision by going more to the north, she was liable. A view, somewhat different from the general one, has been recently taken by the Supreme Court of the United States. After stating the general rule relating to the case of a steamer meeting a sailing vessel, the court said: "Practically, when a rule for this purpose is laid down, it is rendered ineffectual by admitting exceptions to it. The mind begins to waver as soon as the danger arises, and the exception, rather than the rule, becomes a subject of solicitude with the masters of both boats; and this practically annuls the rule, and causes the movements of both vessels to be uncertain. If the rule were absolute, and an insuperable difficulty should prevent one of the boats from observing it, it would be safer and better, to slow the vessel, or stop it, until the danger shall be past. This would occur so seldom as to be inappreciable, when compared to the safety it would secure." The Steamer Oregon *v.* Rocca, 18 How. 570, 572. And Mr. Justice *Curtis*, in a subsequent case in the same volume. Crockett *v.* Newton, p. 581, 583, speaking of the general rule, said: "And though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule. The court must clearly see, not only that a deviation from the rule would have prevented a collision, but that the commander of the sailing vessel was guilty of negligence, or a culpable want of seamanship in not perceiving the necessity for a departure from the rule, and acting accordingly." See also, Wheeler *v.* The Eastern State, 2 Curtis, C. C. 141. And, in the case of The Test, 5 Notes of Cases, 276, it was held, that it was no defence to a vessel clearly in the wrong, that the other vessel might, by departing from the ordinary rules of navigation, have avoided the collision.

[1] The Celt, 3 Hagg. Adm. 321. In this case it was held, that a vessel, which did not render assistance after the collision, should pay costs, although she was, in no respect, otherwise in fault.

[2] Smith *v.* Condry, 1 How. 28. A different rule is, however, laid down in the case of The Vernon, 1 W. Rob. 316. It is there held, that where a party seeks a remedy, he must take it according to the law of that country in which it is to be enforced. See also, The General Steam Nav. Co. *v.* Guillou, 11 M. & W. 877; The Johann Friederich, 1 W. Rob. 35.

In measuring the damages in a case of collision, all the direct and immediate consequences are to be taken into consideration; as loss of freight, detention, expense, and the like.[1] Whether damages are to be allowed for the detention of the injured vessel while undergoing repairs, may not be certain; but the later, and, we think, the better rule, allows them.[2] The rule in insurance,

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[1] In The Countess of Durham, 9 Month. Law Mag. (Notes of Cases), 279, the law is stated with great precision by Dr. *Lushington*. He says: "No doubt by the law of this court, when it is clearly proved that one vessel is the wrongdoer, the owners of that vessel are, to the extent of its value, responsible for all the damage which occurred through the default or neglect of her master or crew, and not only the immediate damage, but they would be responsible also for what we call *consequential* damage, that is, all damage which may subsequently take place that could be fairly attributed exclusively to the act of the original wrongdoer: and this principle of law is based, like all others, upon reason and common sense." And where a vessel was run into, and rendered unmanageable, in consequence of which she afterwards, but during the same night, got upon a sand bar, it was held, that the other vessel, being in fault in causing the collision, was liable for the subsequent damage. The Mellona, 3 W. Rob. 7. See also, The Steamboat Narragansett, Olcott, Adm. 246. In such a case it has been held, that the burden of proof is on the vessel causing the original damage, to show that the subsequent injury was caused by the want of ordinary nautical skill and prudence on the part of the master of the damaged ship. The Pensher, Eng. Adm., 20 Law Reporter, 471. And in the case of The Gazelle, 2 W. Rob. 279, 284, Dr. *Lushington* says the party is to be put in the same situation, as nearly as possible, as he would have been in if no collision had taken place. In The Pactolus, Eng. Adm. Ct., 20 Law Reporter, 226, it was held, that the expenses of repairing the vessel were to be allowed, although the vessel was thereby rendered more valuable than before the collision. Where a boat was several times maliciously run into, Mr. Justice *Hopkinson* held, that damages should be given for the loss consequent on the passengers being prevented from going in the boat by reason of the collisions. Ralston *v.* The State Rights, Crabbe, 22. And in Steamboat Co. *v.* Whilldin, 4 Harring. Del. 228, 233, it was held, that if the boat was purposely run into, vindictive damages might be given. But, if not purposely, compensatory only, to enable the owners to put her in as good order as before, but no allowance was to be made for supposed profits. See also, The Steamboat Narragansett, Olcott, Adm. 246; The Bark Lotty, id. 329, 334; Myers *v.* Perry, 1 La. Ann. 372; and Cummins *v.* Spruance, 4 Harring. Del. 315, where the same rule was adopted, and it was also held, that if the vessel received injuries which could not be repaired, damages were to be allowed for her impaired value. See also, Atchison *v.* Steamboat Dr. Franklin, 14 Mo. 63; The Pilot Boat Blossom, Olcott, Adm. 194.

[2] In some of the cases above cited and in Smith *v.* Condry, 1 How. 28, they were not allowed. But the last case has been virtually overruled by a late case in the same court, and we consider the well-settled rule of law now to be, that where a vessel is run into while performing a particular voyage, or while engaged in the usual course of her employment, the profits which she would have made but for the accident are to be allowed. Thus, in The Gazelle, *ut sup.*, the gross freight for the voyage was allowed, deducting from it the expenses incident to its receipt, such as wages, pilotage, lighterage, tonnage, etc. See also, Yates *v.* Whyte, 4 Bing. N. C. 272, 5 Scott, 640; Jones

of one third off, new for old, does not apply to a claim for damages from collision, excepting in an action on the policy.[1]

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v. Whyte, 2 Jur. 303; The Eolides, 3 Hagg. Adm. 367; Tindall *v.* Bell, 11 M. & W. 228. And where a vessel was engaged in a salvage service, and was run into, and thereby prevented from completing it, it was held, that the sum, which she would otherwise have earned, might be recovered. The Betsey Caines, 2 Hagg. Adm. 28. In The Yorkshireman, 2 Hagg. Adm. 30, note, a fishing smack was on a voyage from London to Norway, to receive a cargo of lobsters. Having been run into, another vessel was employed to finish the voyage, and it was held, that the amount of freight which was paid to this vessel should be allowed as damages. In a somewhat similar case Dr. *Lushington* held, that if it could be satisfactorily proved that the owners of the vessel used every possible exertion to pursue the voyage and could not, damages would be allowed. The Aline, 5 Month. Law Mag. 302. In Smith *v.* Condry, 1 How. 28, the plaintiff offered to prove that his ship at the time of the collision was loaded with salt, and ready to sail for the Georgetown market, and that if she had sailed she would have arrived there in due time for the fishing season, but owing to the collision she did not arrive there till after it was over, and that her loss thereby amounted to over two thousand dollars. This evidence the court refused to admit, and held, that the actual damage sustained by the party at the time and place of the injury was the measure of damages. This question came before the same court in a later case brought up by writ of error from the Circuit Court of the United States for the district of Ohio. The case was argued at great length by counsel, and the principles, on which the right to recover for loss of profits, rest, clearly elucidated by the court. The judge in the court below instructed the jury that if they found for the plaintiff, they should give him damages, which would remunerate him for the expenses incurred in raising the boat and repairing her, *and also for the use of her during the time lost by reason of the collision.* (Barrett *v.* Williamson, 4 McLean, C. C. 589.) This ruling was affirmed by the supreme court. Mr. Justice *Nelson* said: "But if it can be shown, that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost in consequence of the damage the amount which she might have thus earned. The market price, therefore, of the hire of the vessel, applied as a test of the value of the service, will be, if not as certain as in the case where she is under a charter-party, at least, so certain that, for all practical purposes, in the administration of justice no substantial distinction can be made. It can be ascertained as readily, and with as much precision, as the price of any given commodity in the market, and affords as clear a rule for estimating the damage sustained on account of the loss of her service as exists in the case of damage to any other description of personal property of which the party has been deprived." Williamson *v.* Barrett, 13 How. 101, 111. See also, The Inflexible, Eng. Adm., 20 Law Reporter, 471; The Steamboat Rhode Island, Olcott, Adm. 505, Abbott, Adm. 100; Halderman *v.* Beckwith, 4 McLean, C. C. 286. But see The Clarence, 3 W. Rob. 283, where evidence was offered that the boats of the company to which the Clarence belonged, usually earned at least £20 a day, and a demurrage of £260, founded upon this estimate was claimed, as damages. Dr. *Lushington* held, that the evidence was not sufficient; that it did not follow as a matter of course that any thing was due for the detention of a vessel while being repaired; but,

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[1] The Gazelle, 2 W. Rob. 279; s. c. 8 Jur. 429; The Nautilus, Ware, 2d ed. 529, 534. See also, Williamson *v.* Barrett, 13 How. 101, 110, per *Nelson*, J.; also The Hebe, 2 W. Rob. 530, 536.

In regard to the very difficult question, when the cause of the loss is sufficiently near to make the responsibility of a party extend to it, and when it is too remote for that effect, the cases are very conflicting, and it is, perhaps, impossible to lay down a rule which would be satisfactory, and universal, or even general. But we shall consider this question in the chapter on Insurance; and will pass it by here, adding only, that we prefer the English and the later American adjudications on this subject to the earlier American cases.

As to the costs in a case of collision, the general rule is the same in admiralty as at common law; but in the exercise of its equitable power, admiralty may hold the party that wins to pay costs.[1] And when the damage occurs by inevitable accident, no costs are given.[2]

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that it must be proved that the vessel would have earned freight, and that such freight was lost by the collision. See also, The Hebe, 2 W. Rob. 530. And when a vessel is sunk, and full damages are allowed as for a total loss, the plaintiff cannot recover any thing in the nature of a demurrage for loss of the employment of his vessel or his own earnings. The Columbus, 3 W. Rob. 158. And the language of the court in this case would show that in case of a total loss nothing beyond the value of the vessel can be recovered by way of increasing the damages.

[1] The general rule is thus stated by Dr. *Lushington* in The Christina, 8 Jur. 321: "The party, who fails in any suit, except under very peculiar circumstances, should pay the whole of the costs, not as a punishment on that party, but upon the principle of indemnification to the party sued, who has been put to the expense of a suit commenced without sufficient ground, in fact, or in law, to warrant its institution." It was laid down in The Shannon & The Placidia, 7 Jur. 380, 1 W. Rob. 463, and in The Columbus, Abbott, Adm. 384, that, where neither was to blame, each should bear his own costs. But in a similar case, as the court considered the action was brought without cause, the party bringing it had to pay costs. The Thornley, 7 Jur. 659. In Hay *v.* Le Neve, 2 Shaw's Scotch Appeal Cases, 395, both vessels were in fault, one a little more than the other; held, that each should pay his own costs. See also, The DeCock, 5 Month. Law Mag. 303, 2 Law Reporter, 311; The Monarch, 1 W. Rob. 21; Foster *v.* The Sch. Miranda, 1 Newb. Adm. 227, 6 McLean, C. C. 221. In The Montreal, 24 Eng. L. & Eq. 580, it was held, that each should pay its own costs, although one vessel was not liable for any part of the damage, being at the time under the control of a pilot. In Lenox *v.* Winisimmet Co. 11 Law Reporter, 80, the costs were equally divided. But in Rogers *v.* The Brig Rival, 9 Law Reporter, 28, the vessel most in fault bore all the costs. The general rule, as has been stated, is that when a libel is dismissed the respondent shall be entitled to costs. See The Catherine of Dover, 2 Hagg. Adm. 145, 154. But in The Scioto, Davcis, 359, though the libel was dismissed, costs were not allowed the respondent as the court considered, under all the circumstances of the case, that the libellant was not to blame in bringing the action.

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[2] The Itinerant, 8 Jur. 132, 2 W. Rob. 236, 244; The Ebenezer, 2 W. Rob. 206, 213.

By the later and better authority, it would seem that a collision gives to the suffering ship a lien on the ship causing the damage.[1] But this lien lasts only long enough to give the injured party a reasonable opportunity to enforce it.[2]

See also, The George, 4 Notes of Cases, 161. If the damage done is slight, and the party has an adequate remedy therefor in a common law court, costs will not be allowed. The Steamboat Boston, Olcott, Adm. 407. When a case has been decided and sent to a referee to determine the amount of the damage, the general rule undoubtedly is, that the losing party shall pay the costs of the reference. But to this rule there are exceptions. Thus, in the case of The Nimrod, 24 Eng. L. & Eq. 589, the claim was £3,121. The report allowed £1,736. A tender was made before the reference of £1,685. The four principal items disallowed amounted to £1,109. The claimants were condemned in the costs of the reference as to these items, and in the costs of the motion. In The Cynthia Ann, 24 Eng. L. & Eq. 579, the sum demanded was £275, the amount allowed was only £91. The court held, that the sum demanded was so much larger than that granted by the reference that the claimant should pay the costs of the reference and of the motion, as the other party was thereby prevented from making a tender. In The Celt, 3 Hagg. Adm. 321, it was held, that though a vessel was not in fault in causing the collision, yet if she did not render assistance after it, she would be liable for the costs. Dr. *Lushington*, in the case of The Duke of Sussex, 1 W. Rob. 270, observed, that where the government was a party, although there had been much wavering upon the subject, he apprehended the true principle to be that the crown neither gave nor took costs.

[1] Dr. *Lushington*, in The Volant, 1 W. Rob. 383, 387, is reported to have said, that the damage does not create a lien. See, however, The Bold Buccleugh, 3 W. Rob. 220, 2 Eng. L. & Eq. 536. When this latter case came before the privy council, on appeal, the subject received an elaborate discussion, and it was held that a lien existed. The collision took place December 14, 1848. On the 19th suit was commenced in England, but the ship left the country before she could be arrested. Subsequently, the vessel being in Scotland, a suit was commenced against her there and bail given. In August, 1849, the vessel having returned to England, an action was again brought against her, and she was arrested. The lien was enforced, though the vessel had been sold on the 26th of June previous. Sir *John Jervis*, in delivering the opinion of the court, speaking of the *dictum* of Dr. *Lushington*, above referred to, said: "By reference to a contemporaneous report of the same case, 1 Notes of Cases, 508, it seems doubtful whether the learned judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a *dictum* merely, not necessary for the decision of the case, cannot be taken as a binding authority." Harmer *v.* Bell, 7 Moore, P. C. 267, 22 Eng. L. & Eq. 62. In this country the current of authorities is in favor of the lien. In the case of The Creole, Legal Intelligencer, May 7, 1852, Mr. Justice *Kane* said that, though there was, properly speaking, no lien in collision, because the subject was tort, yet the vessel would be liable even in the hands of a purchaser. In the same court it has been held, that collision creates a lien. Edwards *v.* The Steamer R. F. Stockton, Crabbe, 580. See also, The America, U. S. D. C., Northern District of N. Y., 16 Law Reporter, 264.

[2] Where the libel was not filed till more than twenty months after the collision, during which time the vessel had been sold, the colliding vessel was held not to be responsible. The Admiral, U. S. D. C., Mass., 18 Law Reporter, 91.

The question has arisen, when a vessel or canal boat is in tow of a steam tug, and collision occurs, which is responsible, the steam tug or the vessel in tow? It is obvious that two perfectly distinct views may be taken of the relation between them. According to one, the vessel towing is but the servant of that which is towed; this latter is the master, and is responsible for the acts of the former as its servant. According to the other, the vessel towed is for the time under the absolute control of the vessel towing, and this latter is therefore responsible for any mischief done. We apprehend it to be an error to assume that either of these relations must exist in any particular case. The inquiry should always be, which party is the principal, and which the servant. And wherever the relation of principal and agent exists, the case should be decided on the principles of agency. Generally, we should say that the tug was probably the servant, and the vessel which employed her the principal, and responsible as such. But it will be seen that the cases are in irreconcilable conflict.[1]

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[1] It may be clear that an action will lie against the ship where she is the immediate cause of the damage. The Carolus, 2 Curtis, C. C. 69; but is the tug also liable? In a late case before the United States District Court for the District of Massachusetts, Mr. Justice *Sprague* held that it was. The Steamer R. B. Forbes, 19 Law Reporter, 544. The action was *in rem* against the steamer for damages caused by a collision between a schooner owned by the libellant, and the "Romance of the Seas," a vessel of about one thousand six hundred tons, towed by the steamer, and firmly lashed to her side. The evidence was conflicting as to the point whether the orders for managing the two vessels were given by the officers of the tug or by those of the ship. But the learned judge held, that it would make no difference, as to third parties, whether the tug was under the control of the officers or the pilot of the ship. The fact was also relied on that the action was *in rem*, and "the offending thing" was liable. It was also said, that it was not necessary to be decided whether the ship might not also be responsible. It is clear, however, that unless the ship was regarded as under the control and direction of the tug, the latter could not have been held liable, for in this case the ship was "the offending thing," the direct cause of the collision. A similar decision was rendered in Oakman *v.* Steamboat Rescue, U. S. D. C., Mass., Boston Courier, Feb. 16, 1858. In Sproul *v.* Hemmingway, 14 Pick. 1, the action was brought by the owner of a vessel run into by the vessel of the defendant. It appeared that the colliding vessel was being towed astern of a steamer down the Mississippi, and the collision was caused by the negligence of the master and crew of the steamer. It was held, that the defendant was not liable. Speaking of the case of a vessel towed by the side of a steam tug, the court said: "The payment for the privilege of being thus moved or transported, is precisely like freight paid, for heavy luggage, timber, or spars, for instance, carried in or upon a ship. The whole conduct and management is entirely under the control of the master and crew of the towing vessel in the one case, as it is

In admiralty, the evidence of all persons on board is admitted *ex necessitate rei*, unless the person is interested as part

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of the freighting ship, in the other. If collision takes place between the side ship, thus firmly lashed, and another vessel, it is as directly attributable to the steamboat, and her officers and crew, as if the steamboat herself had come into collision with the other vessel. The towed ship is the passive instrument and means, by which the damage is done. But there is no difference, in this respect, between the condition of one of the side ships and a ship towed astern, except this; that on board the ship towed astern by means of a cable, something may and ought to be done by the master and crew, in steering, keeping watch, observing and obeying orders and signs, and if there be any want of care and skill in the performance of these duties, and damage ensue, then the case we have been considering does not exist; the damage is attributable to the master and crew of the towed ship, and they and their owners must sustain it." These cases are in direct variance with two decisions in the Circuit Court of the United States for the Eastern District of Pennsylvania. Smith *v.* The Creole, 2 Wallace, C. C. 485; and The Steam Tug Sampson, 3 Am. Law Register, 337. In both these cases the actions were *in rem* against the tugs, but the court held, that tugs were but servants of large vessels, and therefore were not responsible to third parties. In England the law is the same. In The Duke of Sussex, 1 W. Rob. 270, the action was *in rem* against the tug. It was set up in defence that at the time of the collision she was towing a vessel, and under the direction of a pilot on board such vessel. Dr. *Lushington* held, that if the orders of the pilot were obeyed, the owners of the vessel towed would not be responsible; but if not, they would be. And in The Gipsey King, 2 W. Rob. 537, where the action was brought against the vessel towed, he said: "Now I have, upon former occasions, already expressed my opinion, that a vessel in charge of a licensed pilot, whilst in tow of a steam tug, is, under ordinary circumstances, to be considered as navigated by the pilot in charge. That if the course pursued by the steam tug is in conformity with his directions, and a collision takes place, the pilot is responsible, and not the owners of the vessel, or of the steam tug. If, on the contrary, the steamer disregarded the directions of the pilot, and the collision was occasioned by her misconduct, the owner of the ship would, in this case, be responsible, in this court, as for the acts of their servant; and they must seek their redress against the owners of the steam tug in some other form of action." See also, The Christina, 3 W. Rob. 27; The Kingston-By-Sea, 3 W. Rob. 152. In this case Dr. *Lushington* said, addressing the Trinity Masters: "It is well known, that, according to your rules, a steamer is always to be considered as having the wind free; and by the decisions in this court, a steamer towing another vessel is to be considered as in the service of the owners of the vessel she has in tow, and the owners of the vessel in tow are responsible for the acts of the steamer." It will thus be seen that by the Supreme Court of Massachusetts, and by Mr. Justice *Sprague*, the vessel is regarded as under the control of the tug, and the latter, therefore, is held liable, while, on the other hand, the tug is regarded as the servant of the vessel by the English Admiralty, and by the Circuit Court of the United States for the District of Pennsylvania.

It seems to be well settled that canal boats and barges in tow are considered as being under the control of the tug, and the latter, therefore, is liable. The John Counter, Vice Adm. Ct. Lower Canada, 18 Law Reporter, 553; The Express, 1 Blatchf. C. C. 365, overruling the same case in the District Court, Olcott, Adm. 258. See also, Steamboat New York *v.* Rea, 18 How. 223.

owner.[1] And the admissions of the master are competent evidence against his owners; but admissions of the mate and crew are not, unless made at the time of the collision, so as to form part of the *res gestæ*.[2]

It has been held that an action at common law for damages caused by a collision, will not affect the jurisdiction of the admiralty, and that the verdict of the jury upon the facts of the case will not be conclusive upon the judgment of the admiralty court.[3] When a collision occurs on a river which serves as the boundary of two States, in order to determine in which State it took place, the middle of the river is considered as the boundary line.[4]

When a vessel is sunk by a collision, and subsequently raised by the owner of the colliding vessel and towed into port, the question has arisen whether the former owner is bound to take her, or whether he may recover damages as for a total loss. It has been held that the former owner is not obliged to take her back, after being raised, in an unrepaired state, but the point is still an open one whether she may be repaired and tendered back.[5]

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[1] The Catherine of Dover, 2 Hagg. Adm. 145, and cases cited in note, p. 149.

[2] The Midlothian, 5 Eng. L. & Eq. 556. See also, The Enterprise, 2 Curtis, C. C. 317, 320. But such declarations or admissions will have but little weight in opposition to their deliberate testimony as to the facts. The Steamboat New Jersey, Olcott, Adm. 415.

[3] The Ann & Mary, 2 W. Rob. 189, 190. See also, Souter *v.* Baymore, 7 Barr, 415, s. c. Knox *v.* The Ninetta, Crabbe, 534.

[4] Myers *v.* Perry, 1 La. Ann. 372.

[5] In The Columbus, 3 W. Rob. 158, the vessel was raised but not repaired, and notice given to the agent of the owner of the fact, with an intimation that the owner of the Columbus was ready to deliver up the same, and that he would not be responsible for any further damage or expense that might be incurred by her remaining unrepaired. Dr. *Lushington* said, that the principle of abandonment as applied to insurance cases, did not apply to cases of collision; that if a vessel is run into and partially damaged, the owner is bound to bring her into port if possible, but if she is sunk, it is not incumbent on the owner to go to any expense whatever for the purpose of raising her, and that if, when she was raised, he was obliged to receive her back, he was not bound to repair her, but might leave her lying in port. Under all the circumstances of the case, it was held that the libellant was entitled to recover the whole value of his vessel, and that the respondent was entitled to have the vessel. The court said the proper course for the parties to have pursued would have been "to have applied to the court, stating the circumstances in which the vessel was, and to have called upon the court to decree a sale of the vessel, and that the proceeds might be brought in to abide the result of the suit." Whether the owner of the colliding vessel could have repaired her and tendered her back, after she was raised, was not decided.

It is no defence to a suit for damages caused by a collision, that no loss would have been sustained if the injured vessel had been stronger.[1]

A question has arisen in regard to the right of a vessel to obstruct a navigable stream by means of a warp; and it has been held that a vessel has the right to use one, and to extend it across the entire channel, but on the approach of another vessel, it is the duty of the vessel using the warp to take notice of the approach of the other, and to lower the warp so as to give ample space in the ordinary travelled part of the channel for her to pass, and to give timely notice of the space so left, but it is not bound to slacken so as to leave the entire channel free, and the approaching vessel should take her course in the place pointed out, but she may go elsewhere under a *bonâ fide* belief that the water is deep enough, and if entangled in the warp may cut it, but the burden is on her to show in such a case that the proceeding was *bonâ fide*.[2]

In some of the States of this country, statutes have been passed regulating the manner in which steamboats should pass each other. In other States the usage of the river governs. The boat going with the current, generally is required to keep in the middle of the stream, while the ascending boat keeps close to either shore.[3] Some courts, however, seem to pay but little regard to local usages.[4]

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[1] Inman *v.* Funk, 7 B. Mon. 538.

[2] Potter *v.* Pettis, 2 R. I. 483.

[3] Williamson *v.* Barrett, 13 How. 101; Goslee *v.* Shute, 18 How. 463; Jones *v.* Pitcher, 3 Stew. & P. 135; Myers *v.* Perry, 1 La. Ann. 372; Drew *v.* Steamboat Chesapeake, 2 Doug. Mich. 33; Steamboat Co. *v.* Whilldin, 4 Harring. Del. 228; Moore *v.* Moss, 14 Ill. 106; Rogers *v.* McCune, 19 Mo. 557; Sinnott *v.* Steamboat Dresden, 1 Newb. Adm. 474; Bates *v.* Steamboat Natchez, id. 489.

[4] Wheeler *v.* The Eastern State, 2 Curtis, C. C. 141; The Clement, id. 363, 370.

SECTION VII.

OF THE CLAIM FOR DAMAGES FOR NON-DELIVERY OF THE GOODS OR INJURY TO THEM.

If there be a refusal to deliver the goods, or a delivery to a wrong person, or damage to, or loss of the cargo, for which the ship is responsible, the next question is, Who may make the claim for the goods, or their value, or for compensation for damage, and sustain an action grounded upon it? The consignor has shipped the goods, but has shipped them to the consignee; and which of these parties should make the claim? There has been some conflict, and may yet be some uncertainty in respect to this question; but we think the general principles applicable to this question ought to be sufficient to decide it.

Thus, if goods are shipped by the order of A, and an unindorsed bill of lading is sent to him, and he nevertheless gets possession of the goods by stating to the captain that he is the owner, the ship-owner is responsible to one to whom an indorsed bill of lading is sent.[1] But it has been held that if the first party, who gets possession of the goods in this way, does not know that an indorsed bill is sent to anybody else, the holder of the indorsed bill has no remedy against him.[2] In this case the holder of the goods had an equitable title to them, but if a party has received the goods who has no title to them, both he, and the master who delivered them, should be responsible to him who has the title. But if an indorsed bill be sent, and the goods obtained under it, the master is not bound to respond for the goods to one to whom another indorsed bill was subsequently sent; but, on the contrary, if this other gets possession of the goods, the first consignee may bring trover against him for them.[3]

If goods are sent to a consignee, with an indorsed bill of

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[1] Brandt *v.* Bowlby, 2 B. & Ad. 932.

[2] Coxe *v.* Harden, 4 East, 211.

[3] Walley *v.* Montgomery, 3 East, 585.

lading, the property to be the consignee's on delivery, no question can be made but that he may sue for damages if the goods are injured. But it has been said that if they are to remain the consignor's property, being sent to the consignee only for sale, or if the consignee is for any purpose only the agent for the consignor, then the action must be in the consignor's name. We doubt this, however; and prefer the cases in which it is held that the consignee may bring the action in his own name. In the first place he has a special property in them, for his commissions, charges of entry, etc., and is certainly entitled to their possession; and if he be a mercantile agent for any purpose, he would, in almost every case, have some degree of special property in them, of this kind.

There are supposable cases, perhaps, in which goods may be sent to one who is so nakedly an agent of the owner for merely receiving what is brought in the condition in which it comes, that he can bring no action whatever in his own name, either for the goods themselves, or for any injury done to them. Generally, however, we should say the rule of law was, that a consignee with an indorsed bill, or any commercial agent authorized to take and hold possession of the goods, and deal with them as factor or in any such way, might bring an action in his own name, either for the goods themselves if they were withheld, or for compensation if they were delivered in an injured condition.[1]

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[1] It is laid down in some cases that the party who employs the carrier, is the one to sue. Davis *v.* James, 5 Burr. 2680; Moore *v.* Wilson, 1 T. R. 659; Freeman *v.* Birch, 1 Nev. & M. 420, 3 Q. B. 492. Where the property is to vest in the vendee on delivery to the carrier, the vendee must sue, because the vendor in making the contract with the carrier acted merely as the agent of the vendee. Dawes *v.* Peck, 8 T. R. 330; Coats *v.* Chaplin, 3 Q. B. 483; Dunlop *v.* Lambert, 6 Clark & F. 600. In Van Casteel *v.* Booker, 2 Exch. 691, 708, *Parke*, B., said: "The contract for carriage, which the bill of lading is, is made expressly with the consignor, and he no doubt might sue upon it, though in making it, he was merely acting as agent of and for the consignee. But if he made it as agent for and on behalf of the consignee, the consignee, also, as being the real principal, might sue if there had been a breach of the contract to carry." The bill of lading in this case made the goods deliverable to the consignor. But the cases generally adopt the rule that the party having the right of property and the right of possession is the one to sue, whether consignor or consignee. Tindal *v.* Taylor, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, 216; Potter *v.* Lansing, 1 Johns. 215; Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 B. & P. 582; Brown *v.* Hodgson, 2 Camp. 36; Fragano *v.* Long, 4 B. & C. 219; Ludlow *v.* Bowne, 1 Johns. 1; De Wolf *v.* N. Y. F. Ins. Co. 20 Johns. 214; Price *v.* Powell, 3 Comst. 322; Everett *v.*

One remark may be added; it is that the master of a ship will very seldom do wrong, or incur any responsibility, by adhering rigorously to the letter of his contract, and complying exactly with the obligations he assumes by the bill of lading.

We have seen that the ship-owner cannot require of the shipper to accept the goods at any other place than that of their

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Saltus, 15 Wend. 474; Jones *v.* Sims, 6 Port. 138; Ilsley *v.* Stubbs, 9 Mass. 65; The Venus, 8 Cranch, 253; The Merrimac, 8 Cranch, 317; The Frances, 9 Cranch, 183; The Frances, 8 Cranch, 354; Swain *v.* Shepherd, 1 Moody & R. 223; Brandt *v.* Bowlby, 2 B. & Ad. 932; Mitchel *v.* Ede, 11 A. & E. 888; Dows *v.* Cobb, 12 Barb. 310. In Moore *v.* Sheridine, 2 Har. & McH. 453, the goods were to be delivered by the bill of lading to Mr. Hollingsworth, or at the head of Elk. The consignor brought an action for the non-delivery. The court held that the goods being deliverable to H., or other persons at the head of Elk, the action was well brought by the consignor, but did not determine whether the action could have been supported if the goods had been deliverable to one person only. In Griffith *v.* Ingledew, 6 S. & R. 429, goods were shipped by the consignor on his own account and risk, but they were deliverable by the bill of lading to the consignee or his assigns. It was held that the consignee might maintain an action in his own name for damage done to the goods. The decision was put on the ground that the legal property in the goods passed, by the bill of lading, to the consignee, although he held it in trust for the consignor. Chief Justice *Gibson*, however, dissented. The earlier cases are commented on at great length, and the case is worthy of a careful perusal. Whether the rights of the consignee to such an extent are supported by the weight of authority, it is well settled that *primâ facie* the property in the goods will be considered to be in him, and he will be entitled to sue, in the absence of proof to the contrary. Lawrence *v.* Minturn, 17 How. 100; The Ship Middlesex, U. S. C. C., Mass., 21 Law Reporter, 14; Webb *v.* Winter, 1 Cal. 417; Ogden *v.* Coddington, 2 E. D. Smith, 317; Tronson *v.* Dent, 8 Moore, P. C. 419, 36 Eng. L. & Eq. 41; Coleman *v.* Lambert, 5 M. & W. 502. See also, Snow *v.* Carruth, U. S. D. C., Mass., 19 Law Reporter, 198. In a late case decided by the Supreme Court of Massachusetts, Blanchard *v.* Page, Boston Daily Advertiser, Nov. 25, 1856, the action was brought for damages done to goods carried in the defendant's ship from Boston to New Orleans. The bill of lading was in the usual form, stating that the merchandise was "to be delivered in like good order, dangers of the sea excepted, to Gaines & Co., he or they paying freight." Gaines & Co. were agents to receive the goods at New Orleans and transmit the same to various parties and places. The goods arrived in a damaged condition, and this action was brought by the shippers to recover damages. Part of the merchandise was purchased of the plaintiffs by a party in Arkansas, who requested them to act as his agents in shipping the goods, procuring insurance, etc. The merchandise so purchased was paid for by a note which included insurance, and this note was afterwards taken up. The consignors were not owners of the goods, and the court did not consider that the defendants had made any contract with them, but that the promise to deliver was to the consignees. It was held therefore that they could not recover. Subsequently, however, the court were of opinion, that the consignors might maintain an action in their own names for the benefit of the consignees. Blanchard *v.* Page, June 20, 1857. See also, Cooke *v.* Wilson, 19 C. B. 153, 37 Eng. L. & Eq. 361.

original destination; and that if the shipper chooses not to accept the goods there, he is not liable to pay any freight.[1] We should say, too, that his refusal to accept the goods at such intermediate port, was *not* an abandonment of them to the ship-owner, for the freight; for no freight has been earned, and there would be no consideration for such transfer. But we should hold the owner and the master still liable to account to the shippers for the goods.[2] Undoubtedly this responsibility would be measured and applied on equitable principles. If the shipper, or his agent, might as well have received them there, and transmitted them or taken them home, or to some other place, although not bound to do this, a refusal to do it might justify the master, at least if other circumstances concurred, in selling the goods at once, and accounting for the proceeds.

It has, however, been made a question whether, at the port of ultimate destination, if the goods arrive so injured as to have lost their mercantile value, the shipper may not there abandon them to the master, and pay no freight.[3] We consider it however quite settled as the law of this country, that if the goods arrive in specie, the shipper must pay freight for them, whatever be their condition or value.[4] If that value has been lost or dimin-

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[1] See ante, p. 164.

[2] See ante, p. 167.

[3] See Le Guidon, ch. 7, art. 11; Ord. de la Mar., liv. 3, tit. 3; Fret. art. 25 and 26; Code de Commerce, art. 310; Molloy, de Jure Maritimo, book 2, chap. 2, § 14; Pothier, Charte-partie, n. 60; Boulay Paty, tom. 2, 488. There is a dictum of Lord *Mansfield* in Luke *v.* Lyde, 2 Burr. 882, 887, which tends to sustain the right of the shipper to abandon his goods for the freight. He said: "As to the value of the goods, it is nothing to the master whether the goods are spoiled or not, provided the merchant takes them; it is enough if the master has carried them: for by doing so, he has earned his freight; and the merchant shall be obliged to take all that are saved, or none; he shall not take some and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons he is excused freight, *and he may abandon all, though they are not all lost.*" This doctrine has not been followed in this country. Griswold *v.* N. Y. Ins. Co. 3 Johns. 321, 328. See also the opinion of Mr. Justice *Livingston*, in the same case on a former trial, 1 Johns. 205, 213; Whitney *v.* N. Y. Firemen Ins. Co. 18 id. 208.

[4] "Now nothing is better founded in the law on this subject, than that the shippers are bound to pay the full freight for the voyage, if the cargo is carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea-damage, utterly ruined and worthless." Per *Story*, J., in Jordan *v.* Warren Ins. Co. 1 *Story*, 342, 353. See also, M'Gaw *v.* Ocean Ins. Co. 23 Pick. 405, and cases in note *supra*. In Lord *v.* Neptune Ins. Co., S. J. C., Mass., Nov. T., 1857, insurance was effected

ished by the fault of the master, or without his fault, but from a cause for which he is responsible, then, as we have repeatedly said, the shipper may claim compensation; but he must pay freight.[1]

A more difficult question arises where the barrels or boxes in which the goods *were*, arrive, but there are no goods in them; as where wine or oil or molasses leaks out, or sugar or salt melts and washes out; but the barrels or boxes arrive in as good condition as when put on board. Is freight now to be paid?[2]

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on the freight of the barque Dana, from New York to Havre. On the third day out, the ship met with a peril and was obliged to put back to New York, where the cargo was discharged, in order to repair the vessel, and sold. It would have taken several months to have prepared the cargo by drying for reshipment, and it was conceded that the master acted for the benefit of all concerned in selling it. The court held that, under these circumstances, the insured could not recover. *Shaw*, C. J., in delivering the opinion of the court, said: "The question, therefore, is not, whether the flour and grain, and other articles composing the cargo, would have been of any or what value at Havre; but whether on such reshipment and arrival, *they would have remained in specie*, as flour, wheat, bacon, palm leaf, etc. If so, then it is clear that they were not so totally lost that the plaintiff was prevented, by the peril insured against, from carrying them and earning his freight." See also, Ogden *v.* Gen. Mut. Ins. Co. 2 Duer, 204; Hugg *v.* Augusta Ins. Co. 7 How. 595. In Steelman *v.* Taylor, U. S. D. C., Mass., 19 Law Reporter, 36, an action was brought to recover the freight of one hundred and nineteen tons of coal. This amount was laden on board at Philadelphia, but only one hundred and ten and a fraction were delivered. The court being of opinion that this difference was owing to causes over which the master had no control, and for which he was not liable, decreed freight for the whole.

[1] See ante, p. 151, n. 2; p. 172, n. 3.

[2] The twenty-sixth article of the Ordinance of the Marine, book 3, tit. 3, declares, that, "If goods put into casks, as wine, oil, honey, or other liquors, have leaked out to such an extent that the casks are empty, or nearly empty, the merchant may abandon them for the freight." This article is repeated in the Code de Com. art. 310, and was taken from Le Guidon, ch. 7, art. 11. Considerable discussion has ensued among the continental writers as to the meaning of this article. Valin and Delvincourt contend, that if the casks arrive empty the merchant may abandon, though the loss by leakage be occasioned by reason of the insufficiency of the casks. On the other hand, Pothier (Charte-partie, 59), Boulay Paty (tom. 2, 488), and Ferrard are of opinion that the merchant cannot abandon if the loss is attributable to the insufficiency of the casks. Boucher, Inst. du droit Maritime, 289 (Paris, 1803), states the law as follows: "The captain cannot at all prevent an article from perishing or being injured by its inherent defect. He is, therefore, paid his freight in such a case. But he is to be treated as able to prevent loss by leakage, especially if he has declared that he received it in good order by his bill of lading. We ought, therefore, to attribute a leakage to bad stowage, which he is bound to guard against, and over which he has not exercised all the vigilance possible. For why does one hogshead leak more than another? It is from one of two causes — either from its worse condition, or from worse stowage.

Our answer would be that goods could scarcely perish in this way, except either by a cause for which the ship is answerable, and then the goods should be paid for, deducting freight; or by a peril of the sea, in which case it is clear that no freight is payable;[1] or by intrinsic defect or quality, as by decay, evaporation, or leakage, in which case the freight is due.[2]

In regard to the freight of animals, this distinction seems to be taken. If the money is to be paid for the lading of the animals, then it is due for those which die on the voyage, as well as for those which are delivered alive. But if it is to be paid only for their transportation, then it is not due for those which are not delivered alive.[3] But the carriage of passengers or

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He is not at liberty to make the former assertion. The latter may not indeed be treated as actually proven, but, inasmuch as it is a just presumption, he is to be discharged from the loss, but obliged to take the cask and the remnant for his freight."

[1] Frith *v.* Barker, 2 Johns. 327.

[2] Nelson *v.* Stephenson, 5 Duer, 538. In this case six hundred and twenty-four barrels of molasses were shipped on a voyage from New Orleans to New York. On arrival eight barrels were found to be empty. The molasses was lost by leakage, fermentation, or inherent waste. The barrels were properly stowed and no negligence was imputable to the master or crew of the vessel. Held, that freight was due. The whole subject was discussed at length with great ability, and the court arrived at the following conclusions: That the owner of the goods is bound in the first place to furnish proper casks, and would presumptively be liable for a loss arising from their insufficiency. The effect of an unqualified bill of lading is to transfer this presumptive responsibility to the captain and owners of the vessel. And when the case presents nothing else, if the casks be delivered empty, or nearly so, and the actual cause of the leakage be unknown or conjectural, the owners of the vessel lose their freight. As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the ship-owner and master to prove explicitly that the casks were in fact unsound and badly made, and in such a case the original responsibility of the owner for their condition is restored and he is bound to pay freight.

[3] See Molloy, de Jure Maritimo, book 2, ch. 4, § 8. It is also said by this learned writer, that if no agreement is made either for lading or transporting, then freight is to be paid for the dead as well as for the living. The same rules are laid down by Roccus, n. 76, 77, 78. The reason which he gives for the last rule is, that it does not appear precisely what was intended, and as no fault is shown on the part of the sailors, the contract remains entire, and the whole freight must be paid, because a doubtful contract must be construed against the shipper. See also, Dig. 14, 2, 10. It is difficult to see on what principle of law this reasoning rests. The question is as to the interpretation of an implied contract. This must be determined by the intention of the parties; and the most natural and probable supposition is, that the shipper intended that his animals should be transported and not merely laden on board, and if the master had a different intention it was his duty to have mentioned it. But, even if the intention of the parties is doubtful, the maxim *verba fortius accipiuntur contra proferentem*, would apply, for it has been held that where a carrier gives two notices limiting his responsibility, he is

of animals hardly comes under the name of freight,[1] although the rules of law are the same in most respects.

Sometimes the ship-owner reserves the right to reship the goods, or send them to their destined port in another vessel; the bills of lading containing a provision, that the ship-owner "may send them forward in any other good vessel," or some equivalent phrase. In such case it seems that the ship-owner must still carry them himself if he can, and is under a responsibility for their safe delivery.[2] As such words do not lessen, neither do they enlarge the master's duty, but they are construed as giving him a certain privilege, which he is not bound to exercise.[3]

If a ship does not begin her voyage at all, does not break ground, no freight can be payable.[4] But after the voyage is begun, and an interruption occurs, whatever be the delay it causes,

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bound by that which is least beneficial to himself. Munn *v.* Baker, 2 Stark. 255. See also, Airey *v.* Merrill, 2 Curtis, C. C. 8, and cases cited p. 11. And in Wolcott *v.* Eagle Ins. Co. 4 Pick. 429, 434, there is a *dictum* to the effect that freight is not due for animals, which die on the passage, unless there is an express agreement to that effect. See, however, Moffat *v.* East India Co. 10 East, 468.

[1] Lewis *v.* Marshall, 7 Man. & G. 729. It was held, in this case, that where a broker engaged with a ship-owner to provide a full cargo for the ship, the rates of freight of which should average forty shillings per ton, and the broker put goods on board, the average freight of which amounted to only thirty-two shillings; the contract was broken, though the broker shipped passengers on board, whose passage-money, added to the freight of the cargo, averaged more than forty shillings. See also, Wolcott *v.* Eagle Ins. Co. 4 Pick. 429; Giles *v.* Brig Cynthia, 1 Pet. Adm. 203, 206; Howland *v.* Brig Lavinia, id. 123, 126; and cases post, p. 227.

[2] In Dunseth *v.* Wade, 2 Scam. 285, goods were shipped at Cincinnati to be transported to Peoria under the usual bill of lading, which contained the clause, "with privilege of reshipping on any good boat." Held, that the master was bound to deliver the goods at Peoria, unless their delivery was prevented by unavoidable accidents of the river. The court said: "What change in the terms of the contract did the words, 'with privilege of reshipping on any good boat,' written in the margin of the bill of lading, produce? Was the master discharged from all obligation in relation to the carriage and delivery of the goods at Peoria, by merely reshipping the goods on board 'any good boat?' Clearly not. He was to receive freight on the delivery of the goods at Peoria, for transporting the goods the whole distance. His obligations were consequently coextensive with the reward he was to receive." It was so held also, in M'Gregor *v.* Kilgore, 6 Ohio, 358; Whitesides *v.* Russell, 8 Watts & S. 44. See also, Broadwell *v.* Butler, 6 McLean, C. C. 296; Wilcox *v.* Parmelee, 3 Sandf. 610; Dalzell *v.* Steamer Saxon, 10 La. Ann. 280.

[3] Sturgess *v.* Steamboat Columbus, 23 Mo. 230, where the bill of lading contained this provision, and it was held, that the master was not bound to reship on account of low water.

[4] Curling *v.* Long, 1 B. & P. 634. See also, ante, p. 128, note 1, and p. 167, note 1.

if it occur from a peril of the seas and without any default of the master, as by capture and recapture, embargo, or any thing of the kind, if the vessel finally arrives, without avoidable delay, with the cargo, at the port of final destination, the whole freight is payable.[1]

SECTION VIII.

OF THE LIABILITY FOR FREIGHT.

As the usual bill of lading expresses that the goods are to be delivered to A B, "he paying freight thereon," the receiving of the goods under that bill, whether by the original consignee, or any assignee or indorsee of the bill, is evidence of an obligation to pay the freight;[2] and not only the freight, but the demurrage.[3]

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[1] Davidson *v.* Gwynne, 12 East, 381; Beale *v.* Thompson, 3 B. & P. 405, 420; Moorsom *v.* Greaves, 2 Camp. 627; The Racehorse, 3 Rob. Adm. 101; The Hoffnung, 6 Rob. Adm. 231; Havelock *v.* Geddes, 10 East, 555; Ripley *v.* Scaife, 5 B. & C. 167; Bergstrom *v.* Mills, 3 Esp. 36; Hadley *v.* Clarke, 8 T. R. 259; Baylies *v.* Fettyplace, 7 Mass. 325; M'Bride *v.* Mar. Ins. Co. 5 Johns. 299, 308. See also, cases ante, p. 159, note 2.

[2] From the earlier cases it would be inferred that the fact of an acceptance of the goods by the consignee, or his indorsee, under a bill of lading, containing the clause in question, was a legal presumption that the consignee or his indorsee had made a contract to pay the freight. Dougal *v.* Kemble, 3 Bing. 383; Cock *v.* Taylor, 13 East, 399; Scaife *v.* Tobin, 3 B. & Ad. 523; Jesson *v.* Solly, 4 Taunt. 52. In Merian *v.* Funck, 4 Denio, 110, the court said: "It is well settled that when the goods, by the terms of the bill of lading, are to be delivered to the consignee, or to his order, on payment of freight, the party receiving them, whether a consignee or an indorsee, to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of freight." See also, Smith *v.* Flowers, 6 Mart. La. 12; Shaw *v.* Thompson, Olcott, Adm. 144. In Sanders *v.* Vanzeller, 4 Q. B. 260, it was held, that the reception of the goods by a consignee, or an indorsee, under the indorsement, would be evidence for the jury, from which they would be warranted in finding that the consignee or indorsee thereby contracted to pay freight, but that no contract would arise by implication of law. See also, Zwilchenbart *v.* Henderson, 9 Exch. 722, 25 Eng. L. & Eq. 560; Möller *v.* Young, 5 Ellis & B. 755, 34 Eng. L. & Eq. 92, reversing the same case in the Queen's Bench, 5 Ellis & B. 7, 30 Eng. L. & Eq. 345; Kemp *v.* Clark, 12 Q. B. 647.

[3] Jesson *v.* Solly, 4 Taunt. 52; Harman *v.* Gandolph, Holt, N. P. 35; Harman *v.* Clarke, 4 Camp. 159; Harman *v.* Mont, id. 161; Stindt *v.* Roberts, 5 Dowl. & L. 460. In Wegener *v.* Smith, 15 C. B. 285, 28 Eng. L. & Eq. 356, it was held, that it was a question for the jury whether an indorsee was liable for demurrage,

And if a consignee assigns and indorses over the bill of lading, and the indorsee takes the goods, the original consignee is not bound to pay the freight.[1] But the assignee has been held liable in a case where the bill of lading had not the word "assigns" in it.[2] The mere receipt of the goods by one actually the owner of them, might lay him under an obligation to pay for bringing them; but not the receipt by one who is not owner, unless he receives them under an authority *conditioned* to pay the freight.

And one who is only an agent of the consignee and is known to the master to be no more, does not become personally liable by receiving the goods, and entering them at the custom-house in his own name.[3] But if goods are consigned to A, care of B, or to B, for A, "he or they paying freight," etc., B is not personally liable for freight on receiving them.[4] And if one who is actually indorsee of the bill of lading, obtain the goods, not under the bill of lading, but by some other means, as by an order of the consignee, the consignee himself may be liable, but his indorsee would not be liable for freight; unless a custom on his part to take goods in this way and pay freight for them, suffices to raise the implied assumpsit.[5] But if he obtain the goods under the

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who received the goods under a bill of lading which stated the cargo to have been received "against payment of the agreed freight, and other conditions as per charter-party," and the charter-party contained a provision for demurrage. See also, Smith *v.* Sieveking, 4 Ellis & B. 945, 30 Eng. L. & Eq. 382; s. c. affirmed in the Exchequer Chamber, 5 Ellis & B. 589, 34 Eng. L. & Eq. 97. It was held, in this case, that a bill of lading, by which goods were deliverable to the consignees, "they paying for the said goods as per charter-party, imposed no liability on the consignees to pay demurrage, according to the charter-party, for a detention of the ship at the port of loading, which occurred before the bill of lading was signed.

[1] Cock *v.* Taylor, 13 East, 399; Tobin *v.* Crawford, 5 M. & W. 235, s. c. affirmed in the Exchequer Chamber, 9 M. & W. 716; Dougal *v.* Kemble, 3 Bing. 383; Trask *v.* Duvall, 4 Wash. C. C. 181; Merian *v.* Funck, 4 Denio, 110; s. c. affirmed on appeal; 1 How. Ct. App. Cas. 656.

[2] Renteria *v.* Ruding, Moody & M. 511.

[3] Ward *v.* Felton, 1 East, 507.

[4] Amos *v.* Temperley, 8 M. & W. 798. See also, Grove *v.* Brien, 8 How. 429. But a contrary decision was given in Canfield *v.* Northern Railroad Co. 18 Barb. 586. And see Hindsdell *v.* Weed, 5 Denio, 172.

[5] Wilson *v.* Kymer, 1 M. & S. 157. And in Coleman *v.* Lambert, 5 M. & W. 502, it was held that, although generally a consignee is not liable for freight when there is no bill of lading, yet if the plaintiff can show prior dealings with him, and that he paid freight on those occasions, this will be evidence that he contracted to pay freight, and he will be held liable.

bill of lading, so as to be liable for the freight, he will continue liable although he have delivered over the goods or their proceeds wholly to the consignee before a demand for freight was made upon him.[1]

These remarks upon the effect of the bill of lading and an indorsement of it, and receipt of the goods under it, seem to be true and applicable only where there is no charter-party.[2] It would seem, however, to be an obvious and certain conclusion from established principles, that if a master delivers goods to any party, with notice to him that he should look to him personally for freight, and the party accepts the goods and receives them with this notice, he becomes thereby liable. The only ground of exception would be, that this party had, by his bargain, an absolute right to receive the goods, without any payment of freight, and the master, consequently, had no right whatever to withhold them for want of payment.

If a bill of lading expresses that the goods are to be delivered to a consignee, on payment of freight, if the master delivers them without freight being paid, he cannot afterwards fall back on the consignor, if the goods are the property of the consignee. This must be the general rule. But if the consignor alone owns the goods, such a bill of lading would amount to no more than an order of the consignor to his agent to pay the freight for him; and on the failure of the agent to pay the freight, the principal would still be held.

It seems to be well settled that when there is a charter-party, this is evidence of an express contract on the part of the shipper to pay freight; and the clause in the bill of lading respecting freight is inserted for the benefit of the master, and not of the consignor. And where there is no charter-party, but only a bill of lading, it seems that this amounts to, and imports an implied contract on the part of the shipper to the same effect.[3]

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[1] Bell *v.* Kymer, 5 Taunt. 477, 3 Camp. 545.

[2] See Moorsom *v.* Kymer, 2 M. & S. 303.

[3] Roberts *v.* Holt, 2 Show. 443; Penrose *v.* Wilks, Abbott on Shipping, 415; Tapley *v.* Martens, 8 T. R. 451; Marsh *v.* Pedder, 4 Camp. 257; Christy *v.* Row, 1 Taunt. 300; Shepard *v.* De Bernales, 13 East, 565. In Drew *v.* Bird, Moody & M. 156, Lord *Tenterden* said that where there was no charter-party, and the goods were by the bill of lading to be delivered to a party other than the shipper, or to the assigns of such other party, he or they paying freight, the shipper was not liable, if the goods

Sometimes the freight-money is paid in advance, in whole or in part, or other advances are made to the owner of the ship. Then, if the goods are not delivered, or the voyage not performed, under circumstances which would give the ship-owner no right to claim freight if it had not been paid, the question arises whether he is bound to pay it back. But this question, although not unfrequently attended with some difficulty, is a question of fact rather than of law; and the difficulty is not so much one of knowing what the true principles are, as in what manner they shall be applied.

It is now quite certain, that if the payment be merely a payment of freight in advance, it must be repaid if freight is not earned.[1] And if the sums paid to the master or ship-owner are

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were delivered without payment of freight, unless there were some additional circumstances to show a contract between him and the ship-owner. This case was declared not to be law, by *Parke*, B., in Sanders *v.* Vanzeller, 4 Q. B. 260, 288. The true rule, which has been universally followed, is laid down in Domett *v.* Beckford, 5 B. & Ad. 521, where it was held, that the only difference between a case where there was a charter-party, and one where there was not, consisted in this alone, that, in the former case, by the charter-party there was an express contract on the part of the shipper, and in the latter, an implied one. In Blanchard *v.* Page, S. J. C., Mass., Boston Daily Advertiser, Nov. 25, 1856, a case in which the consignor was the mere agent for shipping the goods, *Shaw*, C. J., said: "As to the consignor's liability for freight, the consignee refusing to pay the same, and the merchandise being worth less than the freight, it is a difficult question, and it will be sufficient to decide that when it comes directly before us." The law, however, seems to be well settled. If the consignor is not the owner of the goods, he is not liable, but if he is the owner, the clause, relative to the delivery on payment of freight by the consignee, is inserted for the benefit of the master, and the consignor is liable. Barker *v.* Havens, 17 Johns. 234; Spencer *v.* White, 1 Ired. 236; Grant *v.* Wood, 1 Zabris. 292; Hayward *v.* Middleton, 3 McCord, 121. The same rule applies to a case of demurrage. Harrison *v.* Spaeth, 23 Law T. 155, 28 Eng. L. & Eq. 132. In Collins *v.* Union Transp. Co. 10 Watts, 384, it is said that the condition was introduced for the benefit of the consignor. The word *not* was omitted before *introduced* by a mistake of the printer. See Layng *v.* Stewart, 1 Watts & S. 222.

[1] In an anonymous case, 2 Show. 283, *Saunders*, C. J., is reported to have said: "Advance money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it come to a delivering port, yet wages are due according to the proportion of the freight paid before, for the freighters cannot have their money." This doctrine is, however, neither sanctioned by the early maritime writers, nor by modern adjudications. See Cleirac, Us et Coustumes de la Mer, p. 42; Ord. de la Marine, du Fret, art. 18; Valin, Com. sur Ord. p. 661; Pothier, Charte-Partie, n. 63; Roccus, n. 80. Some writers are of the opinion that if there is no fault in the master a *pro rata* freight will be due. Straccha, De Nav. 3, n. 24; Loccenius, De Jure Maritimo, lib. 3, ch. 6, § 11; Roccus, n. 81. In Pitman *v.*

but loaned to the ship-owner, then they must be accounted for as loans; that is repaid, with deduction of freight that may become due, and no deduction, if no freight becomes due.[1] But it is quite as certain that the parties may make a different agreement. The shipper may say, if you will take my goods, I will pay you now, so much money, and you may keep it whether you carry the goods to their destined port or not.

This would, strictly speaking, not be an agreement for freight; but it would be an agreement the parties had a right to make. And it might be proved by, or inferred from, circumstances. As if the ship-owner said, I will take your goods to Havre, and will charge twenty dollars a ton payable there, or fifteen dollars if you will pay it here, it might be competent for a jury to infer that the reason for asking so much less at home, was that the payment was not to be at any risk, but was to remain the ship-owner's at all events, and that the shipper paid the money with that understanding.[2] But, if the bargain is money for the car-

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Hooper, 3 Sumner, 50, 66, Mr. Justice *Story* said: "In the ordinary cases of freight paid in advance, I do not understand, that if the voyage is not performed the owner can, without an express stipulation to the purpose, retain it, but the shipper is entitled to recover it back." See also, Manfield *v.* Maitland, 4 B. & Ald. 582; Watson *v.* Duykinck, 3 Johns. 335; Griggs *v.* Austin, 3 Pick. 20; Leman *v.* Gordon, 8 Car. & P. 392, per Lord *Abinger*, C. B.; Brown *v.* Harris, 2 Gray, 359; Phelps *v.* Williamson, 5 Sandf. 578; Cope *v.* Dodd, 13 Penn. State, 33; The Zenobia, Abbott, Adm. 80; Giles *v.* The Brig Cynthia, 1 Pet. Adm. 203, 206; Howland *v.* The Brig Lavinia, id. 123, 126; Mulloy *v.* Backer, 5 East, 316; Gillan *v.* Simpkin, 4 Camp. 241; The Ship Panama, Olcott, Adm. 343, 361. In Mashiter *v.* Buller, 1 Camp. 84, the voyage was from London to Lisbon. By the bills of lading freight was payable in London. Lord *Ellenborough* held that there was a substitution merely of London as the place of payment in the place of Lisbon, but that the performance of the voyage was not dispensed with, and that if freight had been paid on shipment, as the voyage had never been completed, it might have been recovered back. In the case of The Pacific, 1 Blatchf. C. C. 569, the owner of the ship contracted to take the libellant as a cabin passenger from New York to California. Not more than fifty other passengers were to be taken, in order that there might be room for ventilation and exercise. After the passage-money was paid the libellant went on board, and found that seventy-two cabin passengers were engaged, and that the vessel was thereby overcrowded, and dangerous to health. He therefore refused to go. Held, that he might recover back his passage-money, and also damages for the breach of the contract. But if the passenger or shipper cause the non-performance of the contract, the passage-money or freight cannot be recovered back. Detonches *v.* Peck, 9 Johns. 210; Giles *v.* The Brig Cynthia, 1 Pet. Adm. 207, note; Griggs *v.* Austin, 3 Pick. 20.

[1] Manfield *v.* Maitland, 4 B. & Ald. 582, 586, per *Bayley*, J.

[2] In Andrew *v.* Moorhouse, 5 Taunt. 435, the bill of lading stated that the freight

riage of goods, wherever payable, it will be held to be a contract of affreightment, subject to the whole law of freight, unless a different bargain can be shown by the ship-owner, to authorize him to retain money paid to him when freight is not earned.[1] Whether the master or owner has a right to retain money thus paid in advance, is said to be always a question of law;[2] but it is so, we apprehend, only so far as it is made so by the rule that all questions of construction are for the court.

The master may not in all cases have the right to take the freight money in advance, so as to preclude his owners from suing the shippers for it in case he runs off with it, but his authority to receive it may be inferred from subsequent payments made to him on that account, with the approbation of the owners.[3]

If a consignee, or other party, entitled to goods, be compelled to pay more than he is legally bound to pay, in order to get pos-

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was paid. The voyage was from London to the Cape. The broker who made the contract with the shipper, told him that the rate of freight was 5*l.* paid in London, or 7*l.* at the Cape, per ton. The court left it for the jury to say what was the intention of the parties, and they having found that the payment was not conditional on arrival, the court refused to set aside the verdict. The agreement in Watson *v.* Duykinck, 3 Johns. 335, was that the master should suffer the plaintiff to proceed in his vessel as a passenger, and to load on board for transportation goods to the value of six hundred dollars. *Kent*, C. J., held that this meant that the plaintiff should be received on board as a passenger, that he should load the goods on board, and that the master should make all due and *bonâ fide* efforts to transport them. But that he did not contract to deliver them; and that therefore the voyage being broken up, he was entitled to retain the freight. In De Silvale *v.* Kendall, 4 M. & S. 37, the charter-party stipulated that £120 should be paid to the defendant as freight for the outward cargo to Maranham, and as much cash as might be necessary for the ship's disbursements, to be advanced by the plaintiffs when required, free from interest or commission, and the residue of the freight should be paid on delivery of the goods at Liverpool. Lord *Ellenborough* held that the advancing of the freight free from interest, showed that it was not intended as a loan, and that the word "residue" imported that a part of the freight was to be advanced, and the remainder only was to abide the usual course of events. See also, Saunders *v.* Drew, 3 B. & Ad. 445; Blakey *v.* Dixon, 2 B. & P. 321; The John, 3 W. Rob. 170, 177. In Gillan *v.* Simpkin, 4 Camp. 241, it was held, that, a custom being proved that in West India voyages the passage-money was retained whether the voyage was broken up or not, the master might retain it at all events. See also, Watson *v.* Duykinck, 3 Johns. 335. But the custom cannot be proved by particular instances. Cope *v.* Dodd, 13 Penn. State, 33.

[1] Mashiter *v.* Buller, 1 Camp. 84.

[2] Wirgman *v.* Mactier, 1 Gill & J. 150.

[3] Drummond *v.* Winslow, 38 Maine, 208.

session of them, he may recover it back; unless prevented by the rule that money paid in mistake or ignorance of the law cannot be recovered back.[1]

It is usual to agree what shall be paid for freight, and to express this in the bill of lading; but if it is not agreed, or expressed, the amount may be determined in the common way, by showing what the service is worth; and usage would have controlling influence upon this question.

The universal law of illegal contracts, which declares them void, and permits no valid claim to grow out of them, or rest upon them, applies also to the contract of freight. It follows, therefore, that no freight can be earned by an illegal voyage; and this applies to voyages for smuggling or contraband against the laws of the country to which the ship belongs,[2] and to sailing under a license from the enemy.[3] But the illegality must spring from a violation, intended or actual, not of the laws of a foreign country, but of those of the country to which the vessel belongs, and in which the question is raised. For, generally at least, the tribunals of no country take notice of the revenue laws, or other merely municipal laws of any foreign country.[4]

The owner of a ship with a cargo on board, may sell the ship, and the question will arise, who then is entitled to demand the freight. Generally, if a ship is sold before the voyage begins, the right to freight passes to the buyer, who alone can claim it. But if the ship is sold during the voyage, only the seller can claim the freight of the shipper, even if his bargain with the buyer obliges him to pay over the freight to him.

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[1] Geraldes *v.* Donison, Holt, N. P. 346; Brown *v.* North, 8 Exch. 1, 16 Eng. L. & Eq. 486; Chamberlain *v.* Reed, 13 Maine, 357.

[2] In Muller *v.* Gernon, 3 Taunt. 394, the court said that freight was the reward which the law entitled the plaintiff to recover for bringing goods lawfully into the country upon a legal voyage. See also, Blanck *v.* Solly, 8 Taunt. 89.

[3] See The Julia, 1 Gallis. 594, 8 Cranch, 181; The Aurora, 8 Cranch, 203; The Hiram, 8 Cranch, 444; Craig *v.* United States Ins. Co., Pet. C. C. 410; The Ariadne, 2 Wheat. 143; The Langdon Cheves, 4 Wheat. 103.

[4] Gardiner *v.* Smith, 1 Johns. Cas. 141; La Jeune Eugenie, 2 Mason, 409; Richardson *v.* Maine F. & M. Ins. Co. 6 Mass. 102; Kohn *v.* Sch. Renaisance, 5 La. Ann. 25. See also, Holman *v.* Johnson, 1 Cowp. 341; Biggs *v.* Lawrence, 3 T. R. 454; Ludlow *v.* Van Rensselaer, 1 Johns. 94; Planché *v.* Fletcher, 1 Doug. 251; Pellecat *v.* Angell, 2 Cromp. M. & R. 311.

But if the shipper knows this bargain and has consented to it, he becomes, as it were, a party to it, and then the buyer may claim the freight directly of him.[1] And a mortgagee who does not take possession, is not entitled to the freight, unless some special bargain makes him so.[2]

If a ship be lawfully captured, the captor acquires all the rights

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[1] We have seen (ante, p. 138, n. 3) that the indorsee of a bill of lading cannot sue, in his own name, on the bill of lading, for a breach of the contract, and the same principle is applicable in the present case. The respective parties to the contract can alone sue for breach of it. If, therefore, the vessel is sold before the voyage begins, and the contract of affreightment is made by the vendee and shipper, of course the vendee can sue for a breach; but if the vendor should appear by the bill of lading to be the contracting party, it would follow that the action must be brought in his name. Thus in Morrison *v.* Parsons, 2 Taunt. 407, the plaintiff, the owner of a vessel, contracted with the defendants, by a charter-party, that the vessel should go to Stockholm and there load a cargo for Plymouth. Subsequently, but before she sailed, he assigned the ship to the master, but no mention was made of the charter-party or of the freight. After she sailed the plaintiff made an assignment to one Hamilton of the freight, as security for a debt. Hamilton gave notice to the defendants not to pay freight to any one but himself; they however paid it to the master. The plaintiff brought this action in his own name for the benefit of Hamilton. It was held that by the assignment to the master the freight to become due passed, though he could not have brought an action on the charter-party in his own name. See also, Lindsay *v.* Gibbs, 22 Beav. 522. In Pelayo *v.* Fox, 9 Barr, 489, it was held that where the transfer was made after the arrival of the vessel at her port of destination, but before the delivery of the cargo, the transferree would be entitled to freight, as against the assignees of the former owner, by a subsequent assignment. But a covenant to pay freight in a charter-party does not pass by a bill of sale of the ship. Spildt *v.* Bowles, 10 East, 279.

[2] Chinnery *v.* Blackburne, 1 H. Bl. 117, n.; Brancker *v.* Molyneux, 3 Scott, N. R. 332, 3 Man. & G. 84. See also, Alexander *v.* Simms, 5 De G., McN., & G. 57, 27 Eng. L. & Eq. 288. In Gardner *v.* Cazenove, 1 H. & N. 423, 38 Eng. L. & Eq. 330, the plaintiff, the owner of the vessel, sold her, payment to be made by a draft payable twelve months after date. Shortly before it became due, the plaintiff agreed to renew it on condition that the vessel should be transferred to him as security. This was accordingly done, and the plaintiff was registered at the custom-house as sole owner. The vessel was at that time on a voyage, and after the transfer performed a separate voyage in which the freight in dispute was earned. The bill was never paid, and the plaintiff subsequently took possession. Held that the transfer was in effect a mortgage, and as the plaintiff had never taken possession, he was not entitled to freight. But he is entitled to the freight accruing after he has taken possession. Kerswill *v.* Bishop, 2 Cromp. & J. 529, 2 Tyrw. 602; Dean *v.* M'Ghie, 12 Moore, 185, 2 Car. & P. 387, 4 Bing. 45; Langton *v.* Horton, 5 Beav. 9, 19, per Ld. *Langdale*, M. R.; even though he does not take possession till after the vessel arrives in port, provided the goods have not been delivered. Cato *v.* Irving, 5 De G. & Smale, 210, 10 Eng. L. & Eq. 17. In this case it was also held that the mortgagee was obliged to account for his share of the expenses of the voyage.

of the owner, and among them the right to freight; but on the same conditions, that is, of completing the voyage, safe delivery, etc.[1] If the captor injure the property, he is liable to a counter claim by way of set-off.[2] And if the shipper has advanced money to the master to be accounted for in settlement of freight, he may claim allowance for this advance in settlement with the captor.[3]

The contract for the carriage of passengers is, in general, governed by the same rules which regulate the transportation of goods.[4] Sometimes the passage-money is the master's perquisite or privilege. If so, and he dies after making a bargain and before the voyage begins, his personal representatives are entitled to the benefit of the bargain, that is, to the passage-money. But his successor may retain the money which he receives for passage-money on bargains

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[1] The law was stated with great accuracy by Sir *William Scott*, in the case of The Diana, 5 Rob. Adm. 67, 71. He said: "There are two rules on this subject equally general. The first is, that if goods are not carried to their original destination, within the intention of the contracting parties, freight *shall not* be due; and on this ground, that the contract not being completed, either in substance or form, the speculation of the party has not been productive. The benefit of the contract is lost, and the party has to provide another vehicle, to carry on the goods to the port of their destination. In some cases, indeed, it may happen that the port to which the goods are brought may prove more beneficial, and afford a better market. But the court does not enter into the minutiæ of such calculations, which would be attended with great trouble in the inquiry, and much uncertainty in the result. It takes the presumption arising from destination only, and founds upon it the general rule, that, in such a case, the claimant shall receive restitution of his goods without the burden of freight. The other rule, equally general, is, that when the contract is executed, by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, shall be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract." See also, The Vrow Anna Catharina, 6 Rob. Adm. 269; The Fortuna, 4 Rob. Adm. 278; The Fortuna, Edw. Adm. 56. Where a cargo has been brought to the country, but not to the port of destination, it has been held, that the captors are entitled to freight. The Vrouw Henrietta, 5 Rob. Adm. 75, note; The Racehorse, 3 id. 101. See, however, The Wilelmina Eleonora, id. 234.

[2] The Fortuna, 4 Rob. Adm. 278, 282.

[3] The Constantia Harlessen, Edw. Adm. 232.

[4] The Zenobia, Abbott, Adm. 80; Brown *v.* Harris, 2 Gray, 359; Griggs *v.* Austin, 3 Pick. 20; Howland *v.* The Ship Lavinia, 1 Pet. Adm. 123, 125; Watson *v.* Duykinck, 3 Johns. 335; Mulloy *v.* Backer, 5 East, 316, 321; United States *v.* The Owners of the Thomas Swan, U. S. D. C., South Carolina, 19 Law Reporter, 201, 206.

made by himself.[1] And it is said, that if the passenger, in compliance with an established usage, pays his passage-money in advance, it is returnable to him if the voyage never begins, but not if it begins and is interrupted and never finished.[2]

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[1] Siordet *v.* Brodie, 3 Camp. 253. But if his successor expend money in purchasing stores for such passengers, he will be considered the agent of the representatives for that purpose, and they must repay him. Id.

[2] Gillan *v.* Simpkin, 4 Camp. 241. See ante, p. 222, note 1; p. 224, note 1.

CHAPTER VIII.

OF CHARTER-PARTY.

SECTION I.

WHAT CONSTITUTES A CHARTER-PARTY.

We have considered the use of the ship by the owner, in carrying his own goods, or those of others, under bills of lading only. He may, however, prefer to let his ship out to others, for their use. This is commonly done by *a charter-party;* an instrument of frequent use and great importance among merchants. We give the usual form of it in the Appendix;[1] but no especial form is necessary, and it is quite common to introduce into it any stipulations or provisions which the peculiar character of the voyage, or the purposes of the parties may require. Indeed, we say of this contract, as of the sale of a ship and the contract of insurance, that while it is undoubtedly the proper and usual way to reduce the contract to writing, and have it evidenced and defined by a written document, yet we do not know of any rule of law in this country making this indispensable.[2] But, after

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[1] Vide Appendix.

[2] The French Code de Commerce and the Ordinance de la Marine, prescribe that the contract shall be reduced to writing. Code de Commerce, art. 273; L'Ord. de la Marine, liv. 3, tit. 1, art. 1. Valin is of the opinion, however, that it is good by parol. Commentaire sur L'Ord. liv. 3, tit. 1, art. 1; Molloy, de Jure Maritimo, b. 2, c. 4, § 3, states that it is generally in writing but may be by parol. See also, Taggard *v.* Loring, 16 Mass. 336; Perry *v.* Osborne, 5 Pick. 422; Cutler *v.* Winsor, 6 Pick. 335; Thompson *v.* Hamilton, 12 Pick. 425; Vinal *v.* Burrill, 16 Pick. 401, 406; Muggridge *v.* Eveleth, 9 Met. 233, 236; The Phebe, Ware, 263.

the charter-party is signed, any material alteration or addition to it by a party or his agent, will make it null and void, though the alteration was made without any fraudulent design. And it would seem that the rule is the same where the alteration is made by a stranger.[1] And when the charter-party is in writing, parol is not admissible to vary its terms.[2]

As a charter-party may be by parol, the rights and liabilities of the parties to it with respect to a third person, are fixed when the contract is complete and are not affected by a subsequent instrument in writing.[3]

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[1] In Crookewit *v.* Fletcher, Exch. 1857, 40 Eng. L. & Eq. 415, which was an action by an owner of a vessel against the charterers for refusing to take the vessel, the defendants pleaded that whilst the agreement was in the possession of the plaintiff, it was, without the knowledge or consent of the defendants, altered in material particulars (setting them forth), that the alteration was not made in correction of any mistake or to further the intention of the parties, by reason whereof the agreement became void. It appeared in evidence that after the charter-party was signed, the agent of the plaintiff made the alterations complained of, and stated the fact to the defendants when he handed the instrument to them; and on their saying that they did not know whether they would accept it with the alterations, he said that he had made the alterations on his own responsibility, and would strike them out at once. The defendants afterwards refused to accept the instrument. The court said: "We also think that the addition to or alteration of the charter is a fatal objection to the plaintiff's right to maintain the action. It is no doubt apparently a hardship that where what was the original charter-party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, a perfectly innocent man should thereby be deprived of a beneficial contract; but, on the other hand, it must be borne in mind that to permit any tampering with written documents would strike at the root of all property; and that it is of the most essential importance to the public interest that no alteration whatever should be made in written contracts, but that they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration." Pigot's case, 11 Rep. 26, and Davidson *v.* Cooper, 11 M. & W. 778, were cited. The replication of the plaintiff stated that the alteration was made by a stranger, but the court said that if this had been proved to be true the defendants would have been entitled to a judgment *non obstante veredicto*.

[2] The Eli Whitney, 1 Blatchf. C. C. 360; Pitkin *v.* Brainerd, 5 Conn. 451. Any stipulation not inserted in the contract will be considered as waived. Renard *v.* Sampson, 2 Kern. 561, 2 Duer, 285. But in Almgren *v.* Dutilh, 1 Seld. 28, where a vessel was let, reserving what was necessary for the accommodation of the officers and crew, evidence of a conversation made pending negotiations for a charter-party, in regard to the part necessary, was admitted.

[3] Swanton *v.* Reed, 35 Maine, 176. The defendant in this case verbally chartered his part of the vessel on the first of the month, and on the tenth a charter-party was signed and sealed. The plaintiff furnished supplies on the third, and it was held, that the defendant was not liable.

It has been contended that a charter-party is a conveyance within the meaning of the act of 1850,[1] and therefore, unless recorded, is void except as to persons having notice of it. But the courts are inclined to take a different view, and to consider the act as not applying to a charter-party.[2]

Formerly, charter-parties, being a kind of maritime indenture, were sealed; but we infer from the books that the omission of the seal is general now in England, as well as in this country, where, indeed, it is quite universal. No advantage whatever is obtained by putting a seal to the instrument; and, although we have some doubts whether all the technical rules in regard to specialties would be now applied to a sealed charter-party, it is certain that such instruments have received a narrow and merely technical construction within a few years, and the contract would probably be embarrassed by the use of a seal at present. For particulars of the difference, we refer to our note.[3]

An agreement that the parties will hereafter make a charter-party, is not, in law or in fact, the same thing as a charter-party. But an agreement for a future charter-party which contains all the terms and provisions of the instrument, and which appears to be treated as a charter-party by the parties, will be so regarded by the court; or, what would be the same thing, this agreement, together with the facts, would be evidence of a contract made

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[1] Chap. 27, § 1, 9 U. S. Stats. at Large, 440.

[2] Ruckman *v.* Mott, U. S. C. C., N. Y., 16 Law Reporter, 397; Hill *v.* The Golden Gate, 1 Newb. Adm. 308.

[3] The chief differences, which exist between a charter-party under seal, and one not under seal, are these. If the owner of a ship has no agent in a foreign country, the master, *virtute officii*, being an agent of the owner, can let the ship by charter-party, within the usual course of her employment. Hurry *v.* Hurry, 2 Wash. C. C. 145; Ward *v.* Green, 6 Cow. 173. And if he is shown to have been master, he will be deemed to continue to hold that character until some overt act or declaration of the owners displaces him from that situation. The Sch. Tribune, 3 Sumner, 144, 149. But he cannot make a charter-party under seal, because a deed under seal must be made by the party himself, or by another for him in his presence; or in his absence, by an agent authorized by a deed under seal. Horsley *v.* Rush, reported in Harrison *v.* Jackson, 7 T. R. 209; Pickering *v.* Holt, 6 Greenl. 160. Again, in contracts not under seal, if the agent intends to bind his principal, it will be sufficient if it appear from the contract that he acts as agent, but in those under seal, if he does not use the name of his principal, he alone will be liable. Andrews *v.* Estes, 2 Fairf. 267; New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56. As to what is the proper way for an agent to sign in order to hold his principal liable, see 1 Parsons on Contracts, p. 47.

but not written.[1] So a promise to accept a bill of exchange is sometimes treated as an acceptance;[2] and an agreement to lease, as a lease.[3]

SECTION II.

OF THE GENERAL PROVISIONS OF A CHARTER-PARTY.

The charter may be formed in either of two ways. It may provide, that the owner lets and the charterer hires the whole capacity and burden of the vessel, except so much as is necessary for the accommodation of the officers and crew, the storage of provisions, sails, anchors, cables, etc.,[4] in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide. Or it may provide for an

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[1] The Schooner Tribune, 3 Sumner, 144. The instrument in this case was as follows: "I hereby agree, within three days, to be ready at Hampden, with a new suit of sails on the Tribune, to load for T. W. Letson (the libellant), and proceed without delay to Lubec, to take in what may be wanted to constitute her cargo, and proceed to Havana, and back to any port of the United States; also, that the charter-party shall not *commence* until she is loaded at Lubec, provided I am not detained over seven days in loading said vessel." Signed by the master. On the same paper, immediately below this, was the following memorandum, signed by the libellant: "I agree to allow said vessel on said charter-party, five hundred Spanish dollars per month. The charter to be *made* at Lubec." Mr. Justice *Story* held, that though the meaning of this instrument was, that the charter-party should be made at Lubec, yet that it might be treated as a charter-party, which, though loose and informal, still contained the substantial provisions of such an instrument; and that the making of a more formal instrument under such circumstances might be treated rather as a further assurance than as the inception of a maritime charter-party. See also, Lidgett *v.* Williams, 4 Hare, 456, 462.

[2] Clarke *v.* Cock, 4 East, 57, 69; Wynne *v.* Raikes, 5 East, 514; Ex parte Dyer, 6 Ves. 9; Pillans *v.* Van Mierop, 3 Burr. 1663; Payson *v.* Coolidge, 2 Gallis. 233, 2 Wheat. 66; Russell *v.* Wiggin, 2 Story, 213; Ulster County Bank *v.* McFarlan, 3 Den. 553.

[3] Warman *v.* Faithfull, 5 B. & Ad. 1042.

[4] In Almgren *v.* Dutilh, 1 Seld. 28, the charter-party contained such a stipulation, and it was also agreed that should the captain take freight in his cabin, the charterers should furnish it at the current rates. It was held, that the officers and crew were entitled to be accommodated in the mode suitable to their station, the character of the vessel, and the nature of the voyage being taken into consideration, and that if the captain and crew gave up their usual quarters and occupied more confined ones, they were entitled to freight for the part given up.

entire surrender of the vessel to the charterer, who then hires her as one hires a house, takes her empty, and provides the officers, crew, provisions, etc. Of these two modes of chartering, the first is much the more frequent in practice. The distinction between them is sometimes important in its bearing upon the question, whether the owner or the hirer is in possession of the vessel, in such wise as to have the rights, and incur the liabilities, which grow out of possession. As a general rule, words of demise in the charter-party do not pass the possession, if there are other provisions in the instrument which qualify and restrain them;[1] the whole contract must be construed together, and due effect given to every clause.[2] It therefore becomes a matter of some difficulty to state with precision any general rules on the subject, for the same expression will sometimes require a different interpretation in different instruments according to the context. It seems, however, to be generally the rule, that the party that mans the vessel is to be considered as in possession.[3]

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[1] It was held in Hutton *v.* Bragg, 7 Taunt. 14, that if the charter-party contained words of demise, the possession passed to the charterer, notwithstanding other provisions in the instrument which were inconsistent with this supposition. But this case is clearly not the law. It is overruled in Christie *v.* Lewis, 2 Brod. & B. 410. See also, Dean *v.* Hogg, 10 Bing. 345; Palmer *v.* Gracie, 4 Wash. C. C. 110; Hooe *v.* Groverman, 1 Cranch, 214; Clarkson *v.* Edes, 4 Cow. 470.

[2] Marquand *v.* Banner, 6 Ellis & B. 232, 36 Eng. L. & Eq. 136; Belcher *v.* Capper, 4 Man. & G. 502, 541; Clarkson *v.* Edes, 4 Cow. 470.

[3] Palmer *v.* Gracie, 4 Wash. C. C. 110; Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 39; The Sch. Volunteer, 1 Sumner, 551; McIntyre *v.* Bowne, 1 Johns. 229; Holmes *v.* Pavenstedt, 5 Sandf. 97; Ruggles *v.* Bucknor, 1 Paine, C. C. 358; Tuckerman *v.* Brown, 17 Barb. 191. In Certain Logs of Mahogany, 2 Sumner, 589, Mr. Justice *Story* said, that the clause relative to the owner's appointing the master and crew, victualling and equipping the ship, was strong *primâ facie* evidence that the general owner was to remain in possession, and that he would be entitled to it if it was uncertain in whom possession was to vest. In Dean *v.* Hogg, 6 Car. & P. 54, 10 Bing. 345, a person hired a steamboat for the day for a pleasure excursion, the owner hiring the master and crew. It was held that the hirer had not such exclusive possession as would justify him in turning off a stranger who had come aboard, but that his proper remedy was against the owner for a breach of contract. We do not question the general principles laid down in this case, that the owner had the general possession of the vessel, but a contract similar to that made is essentially one for the free, exclusive, and undisturbed use and enjoyment of a part of the boat for a certain time and for certain purposes, and, for the protection and preservation of this use, a power of excluding trespassers is necessary, and therefore such a right of possession as is requisite to its existence should be implied by law. This right of possession is not necessarily exclu-

But this may be rebutted by clear evidence to the contrary.[1] If one party appoints the captain and the other pays him, he is generally considered as holding the possession of the vessel for the party appointing him.[2] But the mere fact of there being a person on board, appointed by the owner who was to have the sole charge of the vessel, with power to displace the charterer for the breach of any covenant in the charter-party, would not render the

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sive of the possession of another for a different purpose, and may perfectly well consist with a simultaneous possession in the master and crew for the purpose of navigation or any other similar object. It was not the mere entry of the plaintiff on board the boat which made him a trespasser against the defendants, but his entry for a purpose inconsistent with their exclusive enjoyment of their part of the boat, and we presume that if he had withdrawn to those parts of the boat to which their privilege did not extend, as to the machine room, or the quarters of the crew, the defendants would then have had no right to expel him from the boat.

It was held in Parish *v.* Crawford, 2 Stra. 1251, Abbott on Ship. 42, that, where the charterer was to have the freight of goods, and the owner the freight of passengers, and he appointed the master, and covenanted with the charterer for his good behavior and the condition of the ship, the owner was liable for a breach of a contract of affreightment entered into by the master with a third person. Abbott doubts the correctness of this decision, and cites James *v.* Jones, 3 Esp. 27, and Mackenzie *v.* Rowe, 2 Camp. 482. This case, however, appears to us to be correctly decided, and the cases cited by Abbott are not necessarily of authority against it, for the forms of the charter-parties are not set forth in the respective decisions.

In Campbell *v.* Perkins, 4 Seld. 430, the defendants owned a line of boats and chartered one of them to another company for a single trip, they, however, retaining the command of it and navigating it. Held that they were liable for the loss of a passenger's baggage.

[1] Per *Story*, J., in Certain Logs of Mahogany, 2 Sumner, 589; Drinkwater *v.* Brig Spartan, Ware, 149, 160, per *Ware*, J. And in Lyman *v.* Redman, 23 Maine, 289, it was held that the captain did not become the owner *pro hac vice*, merely by victualling and manning the vessel, and by receiving a share of the profits, but that he must have the entire control and direction of the vessel, and the owner must surrender all control over it.

[2] In Lander *v.* Clark, 1 Hall, 355, the owners were to keep the vessel tight, and pay the charges of victualling and manning her, the charterer was to appoint the master, and put such goods on board as he thought proper, and was to pay port charges, pilotage, etc., and to deliver up the vessel on his return. Held that the owners had parted with their possession. In Fenton *v.* Dublin Steam-Packet Co. 1 Per. & D. 103, 8 A. & E. 835, an action was brought against the owners of a steam-packet for injuries done to the plaintiff's vessel by the negligence of the crew of the steam-packet. The vessel was under a charter-party at the time of the alleged wrong, the charterer paying the captain and crew, and all disbursements, harbor dues, pilotage, etc. The owners appointed the captain, crew, and engineers. The captain obeyed the orders of the charterer as to where the vessel was to go, but not as to the mode of navigation. The court held that the crew were the servants of the owners, and that they were therefore liable.

general owners liable for a breach of a contract of affreightment.[1] If the general owners held out any false colors, which might induce a belief that the ship would sail under their control, they would be liable as owners, but the circumstance that one of the owners was on board, and was introduced to the injured party as such, and made inquiries as to the probability of obtaining freight, and that the custom-house documents remained unchanged, is not such a holding out as makes them liable.[2] The master may hire the vessel as well as a stranger, and this may be done either for a stipulated sum, or on shares. The owner may contract to pay the master half the profits in lieu of wages, and the master may in such a case be considered as holding the vessel as agent for the owners.[3] But generally there is no distinction between the rights and liabilities of the parties whether the vessel is let to the captain or to a stranger.[4] And one owner may hire the vessel from the others in the same way

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[1] Newberry *v.* Colvin, in the Exchequer Chamber, 7 Bing. 190, reversing the decision of the Queen's Bench, 8 B. & C. 166. The judgment of the Exchequer Chamber was affirmed in the House of Lords, 1 Clark & F. 283, 6 Bligh, N. R. 167. In this case the master was the charterer at a certain rate per month. He was to provide all necessaries, and pay and defray all port charges, and pilotage, and remit all freight bills for the homeward cargo to a firm in London to hold as security for the balance of freight due the owners, if any. The owners were to have an agent on board with the powers stated in the text.

[2] Pitkin *v.* Brainerd, 5 Conn. 451.

[3] The Nathaniel Hooper, 3 Sumner, 542, 575; Arthur *v.* Sch. Cassius, 2 Story, 81. It is, however, to be remarked that these cases were against the ship *in rem*, and it is well settled that a charterer has the power to bind the vessel, though he cannot bind the owners. See ante, p. 124, note 1. The language of *Story*, J., however, it would seem, was intended to apply equally to the case of an action against the owners *in personam*. See also, Lyman *v.* Redman, 23 Maine, 289, p. 234, note 1, ante. Where the owner of a vessel signed and delivered to the master a writing, directing him where to proceed with the vessel and how to employ her, instructing him to use his best exertions to obtain freight for the benefit of all concerned; authorizing him to represent her as a first-rate vessel, copper fastened throughout, two years old, and in good order; enjoining him to use all suitable care to keep her in proper condition; to be cautious in the selection of the commission merchants he might employ; to obtain offers to purchase her, and to communicate them to the owners; to remit the earnings to them; and for his services as master, and for victualling, manning, and one half the port charges, he was to receive one half of all freights, primage or earnings of the vessel, the other half to belong to the owners, deducting the wages of one seaman; it was held that this instrument was not a charter-party, and did not exempt the general owners of the vessel from liability for necessary supplies for the voyage, furnished on the master's order. Latham *v.* Lawrence, 13 Conn. 299.

[4] Hallet *v.* Col. Ins. Co. 8 Johns. 272; Reeve *v.* Davis, 1 A. & E. 312.

and with the same responsibilities.[1] The more frequent practice at the present day, when the master hires a vessel, is for him to take it on shares, in which case he is considered as having the entire control and possession of the vessel.[2] And there is no difference between a fishing voyage and any other in this respect.[3]

When the earnings of a vessel let on shares are collected, they are equally the money of the owner and master, and the latter becomes a trustee of the owner's share. And if a third person, knowing all the facts, is authorized by the master to receive the freight already earned, and promises to pay the owner his share, and afterwards receives the money, he holds it for the use of the owner, and the latter may sue him for it.[4] It has been said that if goods are furnished to a vessel, and the defendants are proved to have been owners at the time, the presumption is that the goods were furnished for their benefit, and the burden of proof is on them to show that the vessel was not then in their possession.[5] The general principles above laid down, apply also to the case where a vessel is chartered by government, and the rule seems to be that the owners are generally liable, if they pay and maintain the officers and crew, although there be a superior officer on board, appointed by the government, unless the loss occur by reason of an order of such officer.[6]

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[1] McLellan *v.* Reed, 35 Maine, 172. In this case a stipulated price was to be paid, and the owner was held not to be liable for repairs, supplies, or outfits.

[2] Webb *v.* Peirce, 1 Curtis, C. C. 104; Thompson *v.* Snow, 4 Greenl. 264; Thomas *v.* Osborn, 19 How. 22; Perry *v.* Osborne, 5 Pick. 422; Cutler *v.* Winsor, 6 Pick. 335; Winsor *v.* Cutts, 7 Greenl. 261; Houston *v.* Darling, 16 Maine, 413; Williams *v.* Williams, 23 Maine, 17; Sproat *v.* Donnell, 26 Maine, 185; Taggard *v.* Loring, 16 Mass. 336; Thompson *v.* Hamilton, 12 Pick. 425; Ruckman *v.* Mott, U. S. C. C., N. Y., 16 Law Reporter, 397.

[3] Mayo *v.* Snow, 2 Curtis, C. C. 102.

[4] Williams *v.* Williams, 23 Maine, 17.

[5] Blackstock *v.* Leidy, 19 Penn. State, 335.

[6] Fletcher *v.* Braddick, 5 B. & P. 182; Hodgkinson *v.* Fernie, 2 C. B. N. S. 415, 40 Eng. L. & Eq. 306. In Trinity House *v.* Clark, 4 M. & S. 288, an action was brought against an owner of a vessel for tolls in respect of certain lights, etc., on the coast. The vessel was chartered to the transport Board. The general owner furnished the master and crew, but it was held that he was not liable. The decision proceeded partly on the ground that the construction which enabled the government to enforce a prompt obedience to its terms should be adopted, and that it was more for the benefit of the government to consider it in possession, than to compel it to resort to an action for a breach of the contract if any took place.

The charter may be for one or more voyages; or for any time certain.[1] It may also be — like a tenancy at will — without any definite term expressed in the contract; and then the law implies a reasonable term, requiring the parties to regard the contract as remaining in force during the whole of any voyage which is undertaken by the charterer before reasonable notice of the intention to terminate the lease is given him by the owner. But, with this exception, such charter-party is determinable at the pleasure of either party.[2]

The charter-party usually expresses the burden of the ship, and ought always to do so correctly. And if there is an error in this respect, made wilfully and knowingly by the owner, he cannot make it the ground of any claim for the charter money. As if he stated the burden too high, in order to cheat the charterer into giving him, in a gross sum, more than would have been given for the actual tonnage; or if he puts it in a charter by the ton too low, and thereby induces the charterer to engage to fill her, which otherwise he would not do; in neither case can he profit by his falsehood. And the fraud in such a case would probably render the contract entirely void.[3] But it seems to be settled that, if the owner makes a false representation in ignorance and in good faith, respecting the burden, whether he makes it too high or too low, the charterer is bound by the terms of the bargain.[4]

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[1] In McGilvery *v.* Capen, S. J. C., Mass., March T. 1857, 20 Law Reporter, 296, the defendant hired a vessel and agreed to pay freight at a certain rate per ton for each calendar month the vessel might be employed by them, and at the same rate for any part of a month. The payments were to be made as follows: at the end of every six months the defendant was to pay three months' charter at Boston, "and the balance to the master as it should become due, on discharge of the vessel at the several ports she may discharge at." The vessel was lost in the course of one of the voyages, and the court held that freight was due to the time of the loss.

[2] Cutler *v.* Winsor, 6 Pick. 335.

[3] In Johnson *v.* Miln, 14 Wend. 195, an action was brought on the charter-party to recover the price agreed on for the use of the vessel. It was held that the defendant could show that false representations as to her capacity, anterior to the contract, had been knowingly and fraudulently made by the plaintiff. It was also admitted in Hunter *v.* Fry, *infra*, note 4, that if fraud could have been shown, the decision would have been different. In Johnson *v.* Miln, the defendant only claimed to retain a sum sufficient to compensate him for the damages he had sustained in consequence of the deceit. The question did not therefore arise, whether the contract was rendered entirely void, or not. But, as a general rule, fraud vitiates every contract.

[4] Hunter *v.* Fry, 2 B. & Ald. 421. In this case the vessel was described in the

So, if the charter states the national character of the vessel erroneously, it is said to be no defence to an action against the charterer for not lading a cargo on board of her. But if it was in fact unsafe or illegal to send that cargo in that vessel, and there could have been no contract had her true nationality been known, it would seem that the charterer should be discharged.[1]

If a vessel is described in a charter-party as "A 1," this only warrants that she was "A 1," at the time of making the charter-party, and not that she should continue to be so.[2]

It is common to provide for the state of the ship and for her repairs in the bargain; the usual way being for the owner to stipulate that she is sound, stanch, and altogether sea-worthy; and also that he will keep her in repair, the perils of the seas excepted. If, however, the contract expressed no such stipulations, it is probable that the law would make them.[3] Generally,

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charter-party as being of the burden of two hundred and sixty-one tons or thereabouts. The ship could carry four hundred tons. The shipper put on board two hundred and sixty. The court held that as the misrepresentation did not appear to be fraudulently made, the shipper was bound to load a full cargo, as much as the ship could safely carry, and not having done so, they decreed that the plaintiff should recover as damages the freight which he would have earned, had a full cargo been shipped. See also, Barker *v.* Windle, 6 Ellis & B. 675, 36 Eng. L. & Eq. 132, 37 Eng. L. & Eq. 96. In Ashburner *v.* Balchen, 3 Seld. 262, the charter-party described the vessel as of the burden of one hundred tons or thereabouts. The vessel was of one hundred and forty-two tons burden. As no fraud was shown, the contract was held valid. See also, Thomas *v.* Clarke, 2 Stark. 450. Molloy, in his treatise, "De Jure Maritimo," book 2, ch. iv. § 8, states the law as follows: "If a ship shall be freighted and named to be of such a burden, and being freighted by the tun shall be found less, there shall no more be paid than only by the tun for all such goods as were laded aboard. If a ship be freighted for two hundred tuns or thereabouts, the addition of thereabouts is commonly reduced to be within five tun, more or less, as the moiety of the number ten, whereof the whole number is compounded."

From two recent decisions in regard to the sale of goods, these principles may be deduced. First, that if the owner, in mentioning the burden of the ship in the charter-party, should insert the clause, "say not less than five hundred tuns," this would be a warranty that she should be, at least, of five hundred tuns burden. Leeming *v.* Snaith, 16 Q. B. 275, 3 Eng. L. & Eq. 365. Second, that it was merely, "say from six hundred to seven hundred," and there was no fraud, the vessel need not be even of six hundred tuns burden. Gwillim *v.* Daniell, 2 Cromp. M. & R. 61, 1 Gale, 143, 5 Tyr. 644. An action will not lie *in rem* for a misrepresentation in regard to the tonnage of the vessel. The Eli Whitney, 1 Blatchf. C. C. 360.

[1] Reusse *v.* Meyers, 3 Camp. 475.

[2] Hurst *v.* Usborne, 18 C. B. 144, 36 Eng. L. & Eq. 299.

[3] Putnam *v.* Wood, 3 Mass. 481; Ripley *v.* Scaife, 5 B. & C. 167, per *Bayley*, J. See also, Kimball *v.* Tucker, 10 Mass. 192.

the charterer is bound to victual and man the vessel in the absence of any agreement to the contrary.[1] If the parties choose to make different or further stipulations on this subject, they may do so. But the stipulation of sea-worthiness, whether expressed or implied, is not so far a condition precedent, that no charter money is due if the ship be not sea-worthy; for whatever her condition, if the charterer takes possession of her, and makes use of her, he must pay for that use.[2] But for any detriment which he sustains by reason of her unseaworthiness, he would have a valid claim for indemnity, to be enforced by way of set-off or otherwise. And if by reason of her unseaworthiness the charterer cannot send her to sea, or send his goods in her, or make the use of her he intended, or if he is prevented from doing so in any way by the fault of the owner, he is then subject to no valid claim for the charter-money or any part of it.[3]

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[1] Goodridge *v.* Lord, 10 Mass. 483, 486, per *curiam*. It was *held* in this case that, where the charterers covenanted to victual and man the vessel, and had paid over to the captain appointed by them the money for the wages of the crew, and he allowed the vessel to be libelled for the wages, and the owners, to prevent the sale, paid the amount due, they could maintain an action against the master for money laid out and expended, although the charterers were indebted to the master to the amount which he had retained.

[2] See post, § 6.

[3] The liability of the ship-owner, so far at least as it refers to the commencement of the voyage, bears a considerable resemblance to the implied warranty of sea-worthiness in a policy of insurance, to which indeed it appears to be entirely assimilated in some cases by the courts. See Putnam *v.* Wood, 3 Mass. 481, 485, per *Parker, J.* In insurance, if the vessel is not sea-worthy when she leaves port, the policy never attaches, and this is a perfect defence to an action against the insurer, though the vessel be lost from an entirely independent cause. But this could not be set up by a charterer whose goods were not damaged in any way by such unseaworthiness. In other words, sea-worthiness is not a condition precedent. See post, § 6. As in insurance, the owner is liable for a latent defect. Thus in Backhouse *v.* Sneed, 1 Murph. 173, the rudder of the ship was internally defective, although outwardly sound, and breaking in a storm, the ship was wrecked, and some corn, which was on board, was lost. The ship-owner was held liable. See also, Dupont de Nemours *v.* Vance, 19 How. 162, 167. And if the shipper inspect the boat before putting his goods on board, the owner of the vessel will not be therefore exempt from liability for a loss occasioned by the unseaworthiness. Lengsfield *v.* Jones, 11 La. Ann. 624. In the recent English case of Christie *v.* Trott, 22 Law T. 101, 25 Eng. L. & Eq. 262, the plaintiff shipped a cargo of haricot beans on board the defendants' vessel, which was then lying in dock, for carriage and delivery at another port. Before sailing it came on to blow a gale; the vessel started a plank, the water entered, and the beans were damaged.

It is usual for the master to sign and give bills of lading in like manner as if there were no charter-party; but nevertheless

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There was no direct evidence how the strain on the vessel was occasioned, whether by pressure of the adjoining vessels in dock, or by coming into contact with a mooring chain. The only damage done to the vessel was the starting of a plank which was sound. The repairs cost only five shillings. The jury found the vessel to be unseaworthy. On motion for a new trial, it was held that a vessel which starts a plank in dock is not a sea-worthy vessel, as she ought to be equal to all the strain to which, with other ships, she might be subjected there. See also, Putnam *v.* Wood, 3 Mass. 481; The Bark Gentleman, Olcott, Adm. 110, 1 Blatchf. C. C. 196; Whitall *v.* Brig Wm. Henry, 4 La. 223; Harrington *v.* Lyles, 2 Nott & M'C. 88; Pothier, Charte-Partie, 30; Ord. de la Mar. liv. 3, tit. 3, Du Fret. art. 12; Valin Comm. id. In Sherwood *v.* Ruggles, 2 Sandf. 55, the court were requested to charge that from the vessel's leaking two hours after she sailed, she was presumed to be unseaworthy, unless an adequate cause of the leak should be shown. This instruction was given, and the jury were also told that they might find whether such a cause had been shown. It is sufficient if the vessel be sea-worthy as respects the particular voyage. Bell *v.* Reed, 4 Binn. 127; M'Clures *v.* Hammond, 1 Bay, 99. In Towse *v.* Henderson, 4 Exch. 890, to a declaration, which averred that the ship was ready to load a cargo, of which the defendant had notice, but that the defendants refused to load the cargo, which consisted of tea, on board said vessel, the defendants pleaded that the ship-owner had antimony on board as ballast, which would have injured the teas. It was proved that cargoes of tea had arrived uninjured, though antimony was on board, though such tea was viewed with suspicion. Held that there was no undertaking on the part of a ship-owner, that his vessel, if really fit, should be free from suspicion of unfitness to receive a cargo on board. If the chartered vessel is disabled while taking in her cargo, she must be repaired within a reasonable time, for, if not, the charterer will be at liberty to put an end to the contract. Purvis *v.* Tunno, 1 Brev. 260. In Putnam *v.* Wood, 3 Mass. 481, *Parker*, J., decided that the owner of a ship carrying goods on freight on a circuitous voyage is bound to put her in repair at every port where she may be, and must answer to the freighter for any damage arising to his goods for want of such repairs. So held also in a recent case in England. Worms *v.* Storey, 11 Exch. 427, 33 Eng. L. & Eq. 400. The declaration averred that at the commencement of the voyage the vessel was unseaworthy, and also after the voyage commenced the ship was greatly damaged, and the owner had notice, but did not repair, though the vessel was in a place where repairs could have been had, and that the vessel proceeded on her voyage, but was unable to meet the perils of the seas, as she would otherwise have done, in consequence of which the goods of the plaintiff, the charterer, were thrown overboard. Plea that at the commencement of the voyage the vessel was tight, stanch, and strong, and every way fitted for the same, and sea-worthy. On demurrer it was held that the plea was insufficient. *Parke*, B., said: "It is contended that the owner is discharged of all liability as to unseaworthiness if the vessel was sea-worthy at the time of the commencement of the voyage; but the plaintiff says no, the defendant is bound to repair if he has the opportunity, or at all events that the vessel is not to sail in an unseaworthy state; and I think that is the correct view of his duty, and that in such a case the captain must either repair or stop." That a charterer in this country will be allowed, in an action brought against him for the stipulated price, to offset any damages, which he may have received through the fault of the ship-owner or his agent, see p. 172, note 3.

they are little more than evidence of the delivery and receipt and shipping of the merchandise, for the charter-party is the controlling contract as to all the terms or provisions which it expresses.[1] The master could not be required to sign bills promising to carry and deliver the goods for less freight than had been stipulated; and if he signed such bills, and the goods were shipped by the charterer, they would not give the charterer, or any person shipping goods with a knowledge of the charter-party, any defence against the owner's claims under the charter-party.[2]

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[1] Perkins *v.* Hill, 2 Woodb. & M. 158; Lamb *v.* Parkman, U. S. D. C., Mass., 20 Law Reporter, 186, per *Sprague*, J.

[2] Knight *v.* Cargo of Bark Salem, U. S. D. C., Mass., 20 Law Reporter, 669. In Faith *v.* East India Co. 4 B. & Ald. 630, freight was to be paid by the charter-party in part on the ship's clearing, and the residue, half in cash, and half in approved bills upon the delivery of the homeward cargo. The captain was appointed by the owner and instructed to sign all bills of lading, "freight payable as per charter-party." The ship was consigned to C. & Co. in Calcutta, by whom she was put up as a general ship. Several merchants shipped in her, and C. & Co. took freight bills containing the clause "freight payable sixty days after delivery of the cargo." The captain then signed bills of lading for the goods with the clause "freight payable agreeable to freight bill." These bills were made payable to B. & Co. to whom the charterer was indebted for advances on the outward cargo. B. & Co. knew of the charter-party. It was held, that the owner of the ship had a lien on these goods to the extent of the homeward freight. In Gracie *v.* Palmer, 8 Wheat. 605, overruling the same case *nom.* Palmer *v.* Gracie, 4 Wash. C. C. 110, the vessel was chartered but the possession and control of it remained in the general owners. The charterer put the vessel up as a general ship with notice of its being chartered. Goods were shipped by Palmer upon the following stipulations, that the charterers should draw bills in his favor, and that the goods should be consigned to his correspondents, to whom they should be delivered freight free, in pledge for the payment of the charterers' bills. By the bills of lading the goods were described as shipped on the account and risk of the charterer, and to be delivered to Messrs. Willings, the correspondents of Palmer, "freight for the said goods having been settled here." It was held, that the owner had a lien on the goods for the whole freight due, on the ground that the goods were laden on board as the property of the charterer. The court said: "The question is not, how far his contract may exempt the goods of another from freight, but how far he may incumber his own goods with a lien which shall ride over, or supersede their general liability for freight." The language of the court would also show, that the shipper, if he knew of the charter-party, was bound to inquire what its provisions were. The point was also urged that there could be no lien for freight because as the goods were to be carried freight free, no freight could be due, but the court said that if the case of Faith *v.* East India Co. was followed out this objection would probably be of no avail, as that case proceeded on the ground that the ship-owner was not bound to deliver the goods until his freight was paid, and, therefore, it would seem to be immaterial whether it had been previously paid to the charterer or to any other person not authorized to receive it on account of the owner. And the court held that the point did not arise, because the bill of lading did not state that the goods were to be carried free of freight, but merely said freight

It may be said in general, that the rules in respect to the carriage of cargo, — as that freight is payable only for goods carried and delivered, that the ship has a lien on the cargo for freight earned, and that freight is due *pro rata* when the goods are accepted at an intermediate port, are all of them equally applicable to carriage by charter-party as by bill of lading.[1]

Whether the charterer hires only the burden, or the carrying capacity of the ship, or hires the whole ship and takes her into his hands, the amount which he is to pay does not depend altogether upon the quantity of goods which he sends. For if he hires the whole burden or the whole ship by any words which express or imply that he is to fill her and pay for all she carries, then if he fails to provide a full cargo, he is liable as if a whole cargo had been provided.[2] And it is no answer to such an action that the government refused a permit to load a full cargo if the charterer agreed to obtain it.[3]

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having been settled here. In Gledstanes *v.* Allen, 12 C. B. 202, 22 Eng. L. & Eq. 382, the charter-party stipulated that the goods should be delivered on payment of freight, "a lump sum of £2,800 in full of all charges." At the end of it was the following clause: "The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight the bills of lading of part of the cargo to be filled up for loss, if any." The charterers shipped goods as their own, for which the captain signed bills of lading at a specified rate of freight. The goods so shipped were consigned for sale to the plaintiffs, the correspondents of the charterers in London, who were under a general engagement to honor bills drawn on them by the charterers upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment in question. The court held, that if the agreement relative to the power of the captain to sign bills of lading, had any meaning, it was intended to apply solely to the case of goods belonging to third parties, and that the master had no power to sign bills for the charterers' goods at less rates than stipulated in the charter-party. But see Gilkison *v.* Middleton, 2 C. B. N. S. 134, 40 Eng. L. & Eq. 295.

[1] See ante, p. 149; p. 125, note 1; p. 166, note 1; Sturges *v.* Gairdner, 2 Brev. 233, in which case it was held, that freight *pro rata* could not be recovered in an action of covenant on a charter-party, but that assumpsit was the proper remedy.

[2] Beawes, Lex Mercatoria, 118; Thomas *v.* Clarke, 2 Stark. 450; Thompson *v.* Inglis, 3 Camp. 428; Duffie *v.* Hayes, 15 Johns. 327; Kleine *v.* Catara, 2 Gallis. 61, 66; The Brig Cynthia, 1 Pet. Adm. 203, 207.

[3] Kirk *v.* Gibbs, Exch. 1857, 40 Eng. L. & Eq. 438. The charter-party in this case did not contain any clause relative to the restraint of princes. In Hills *v.* Sughrue, 15 M. & W. 253, where the ship-owner agreed to load a full cargo of guano, it was held to be no excuse for a breach of the agreement that no guano could be obtained, although the charter-party contained a clause that the charterers were to ship bags and other materials requisite for loading the ship, and to supply the stores for the vessel, at cash prices for the voyage, and to deduct the amount from the balance of freight, but in

Where a charterer stipulates to ship a full cargo, consisting of heavy and light goods, he is not obliged to load enough of the heavy goods to keep the ship in proper trim, but the ship-owner is bound to provide sufficient ballast.[1] If the charterer stipulates to furnish a sufficient quantity of goods to fill the vessel, and to load her to a fair and reasonable draft, with enough of a certain kind, or its equivalent, for ballast, the charterer is not bound to provide such goods as the master demands, but if the latter can, with the goods furnished, stow the vessel in such a way as to fill and trim her properly, the obligation of the charterer is performed.[2] But if the charterer stipulates to furnish sufficient funds to fill a certain proportion of the vessel with any or all of certain kinds of merchandise, the master is not bound to apportion the funds among the articles more or less bulky so as to fill the ship with the funds furnished.[3] If the shipper has the option to load the vessel entirely with goods at a higher rate, or partly with such goods, and partly with those of a lesser rate; but the latter, if laden at all, should be laden first; it has been held, that if he begins to load with the goods at a higher rate he cannot use the others.[4] If the charter-party requires the hirer to fill the ship, or load her with a full cargo, or to her utmost capacity, or if any such language is used, he will not be obliged to put in, and if he offers, the owner or master will not be obliged to receive more cargo than she can safely carry, although all the space is not filled.[5] And the opinion of the master on this point is entitled to great weight, and is controllable only by decisive evidence of a mistake on his part.[6]

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the event of the vessel's being lost, or any other unforeseen causes preventing the completion of the charter-party, the owner agreed to pay the charterers the amount of their disbursements for such stores.

[1] Moorsom *v.* Page, 4 Camp. 103. And where the charterer stipulated that one hundred tons of rice or sugar should be loaded first, in order to ballast the vessel, it was held, that after loading the one hundred tons, he was at liberty to complete the cargo with light goods, and if more ballast was needed, the owner was bound to supply it. Irving *v.* Clegg, 1 Bing. N. C. 53.

[2] Rich *v.* Parrott, U. S. D. C., Mass., 20 Law Reporter, 135.

[3] Brown *v.* Putnam, 2 Met. 275.

[4] Benson *v.* Schneider, 7 Taunt. 272.

[5] Weston *v.* Minot, 3 Woodb. & M. 436. See also, Wheeler *v.* Curtis, 11 Wend. 653.

[6] Weston *v.* Foster, 2 Curtis, C. C. 119.

A vessel must be loaded according to the usages of the trade. Where, therefore, a usage was proved to compress bales of cotton wool by machinery, it was held that a stipulation to load a full cargo was not complied with by filling the ship with uncompressed bales.[1]

In one case where, among other goods mentioned, freight was to be paid at a certain rate per quarter of four hundred and eighty pounds for Indian corn *or other grain*, it was held that this latter phrase included only such grain as averaged four hundred and eighty pounds to the quarter.[2] If various articles are specified in the charter-party, which may be taken, at different rates of freight, and the contract also provides that "other legal merchandise" may be taken, but no rate of freight is specified, such goods are not to be taken gratuitously, nor upon a *quantum meruit*, but an average freight of the articles specified is to be taken.[3]

The charterer has a right, unless there be an express stipulation to the contrary, to carry the goods of other people, for whatever he can get; for more than he pays, and so make his profit, or for less, and so save in part what he must pay.[4] But he must pay for all the space and burden which he hires; and that part of the freight-money which is paid for the space or burden that is unoccupied, is called dead freight. There is, however, no lien for dead freight.[5]

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[1] Benson *v.* Schneider, 7 Taunt. 272. So where a shipper agreed to load a full and complete cargo of sugar, molasses, and other lawful produce, it was held, by the Court of Exchequer, that evidence was admissible to prove that by the custom of merchants at the port of lading, a full and complete cargo of sugar and molasses in puncheons and hogsheads, was a compliance with the contract, though the same quantity of sugar, if packed in tierces, would not constitute a full cargo. Cuthbert *v.* Cumming, 10 Exch. 809, 29 Eng. L. & Eq. 456; s. c. affirmed in the Exchequer Chamber, 11 Exch. 405, 30 Eng. L. & Eq. 604.

[2] Warren *v.* Peabody, 8 C. B. 800.

[3] Thomas *v.* Clarke, 2 Stark. 450; Capper *v.* Forster, 3 Bing. N. C. 938, per *Tindal*, C. J.; Cockburn *v.* Alexander, 6 C. B. 791; Warren *v.* Peabody, 8 C. B. 800.

[4] By the French Ordinance it is provided that the charterer shall not underlet at an advance price. Liv. 3, tit. Fret. art. 27. In England it has been held that it may be done; and that where the captain signed bills of lading to sub-charterers whereby they promised to pay six shillings a quarter freight, and the owner, by his contract with the original charterer, was only entitled to four shillings and six pence, this was all he could recover in an action against the sub-charterers, on the bills of lading. Michenson *v.* Begbie, 6 Bing. 190.

[5] See ante, p. 128, note.

The agreement to pay may be so much for the whole ship in a gross sum, or so much for her at such a rate per ton (in which case it has been held that nothing is payable for any thing less than a ton without an express provision),[1] or so much by the bale, box, barrel, or parcel; in which latter case it is usual to agree that not less than so many shall be sent.[2] If the agreement be so much a ton, it should be stated whether by this is meant so much for each ton of legal custom-house measurement, or so much for each ton of her actual capacity. These sometimes differ very widely; and where there is no express provision on this point, and the intention of the parties could not be gathered from any words used by them in connection with the *res gestæ*, or such facts as entered into and were a part of the negotiation, and were admissible as evidence, we should say that the presumption of law would be in favor of the legal measurement. But commercial usage, well established and clearly proved, would undoubtedly have a controlling influence in the decision of this question.

If the charterer pays so much by the ton, and a part of his cargo is lost by a peril of the sea, and therefore never carried, for this part he should pay no freight.[3] But if he pays a gross sum for the whole vessel, or if the language used implies this distinctly, then it would seem that the payment is no more affected by the quantity actually carried, than the hire of a house would be by the use or non-use made of it. It may be difficult to determine the intention of the parties, or the purport of the contract, in this respect. But while there would seem to be no authority for apportioning the freight in the case last supposed above, yet if all the cargo was lost, and none delivered, it would be difficult to maintain any claim for freight-money, unless the contract was distinctly a hiring of the ship by the charterer to use or not use as he pleased while he had possession of her, and not a contract by which the owner engaged to carry goods.[4]

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[1] Rea *v.* Burnis, 2 Lev. 124.

[2] If a ship is chartered by the barrel or bale, freight is payable for the quantity only that is actually conveyed. Roccus, not. 73, 75.

[3] See ante, p. 149, and Roccus, not. 72, 75.

[4] We have seen, ante, p. 149, that, in the case of a general ship, freight is some-

The charterer may take in the goods of others; but as he is bound to pay for the whole burden, he has the control of the whole, and the master has no right, under any circumstances, to take in the goods of other parties against the charterer's will. But, as the policy of the law-merchant makes the master the agent from necessity of all who are interested in the ship or her cargo, so far as any emergency may create this necessity, and as this policy also favors the full use and employment of a ship as a public good, when a master finds that the charterer has not goods enough to fill the vessel, he not only may, but, as we think, should (in the absence of prohibition), take in the goods of others, and thereby relieve the charterer of so much of his obligation, or rather provide him with the means of discharging it. But high authorities have stated that he should not do this without the consent of the charterer.[1] And even if the charterer or his agent should prohibit the master from filling the dead freight, if he had reasonable cause to doubt the charterer's solvency, we apprehend that he would be safe in receiving other goods, after it became certain that the charterer would not fill the ship. Indeed, it would be difficult to see what damage the charterer could sustain, or could recover, if the master filled a space he certainly could not occupy himself, but must pay for, even if he did prohibit this. If, however, the charterer was not insolvent, it might be said that he would be injured by having other goods carried to compete with his own, and that he would prefer pay-

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times due for the goods delivered. But, when a ship is chartered for a specific sum for the voyage, and only a part of the cargo is delivered, the rest being lost by a peril of the sea, it has been held, both in England and in this country, that in an action of covenant on the charter-party, there can be no apportionment of freight. Bright *v.* Cowper, 1 Brownl. 21, cited also by *Grose*, J., in Cook *v.* Jennings, 7 T. R. 385; Malynes, Lex Mercatoria, 100. In Post *v.* Robertson, 1 Johns. 24, the question came before the Supreme Court of New York, and it was held that, in an action of covenant, freight could not be recovered unless all the goods had been delivered. A majority of the court were also of the opinion that if a portion of the goods had been received, an action of assumpsit would lie, to recover freight *pro rata* on the implied promise. See also, Sturges *v.* Gairdner, 2 Brev. 233. The question was raised, and discussed in Weston *v.* Minot, 3 Woodb. & M. 436, but not decided. Mr. Justice *Woodbury* suggested that, to avoid difficulty, the proviso, that freight should be paid *pro rata*, though a full cargo should not, by accident, or other unblamable cause, be delivered, should be inserted in the contract of affreightment. See also, as to contracts generally, Roberts *v.* Havelock, 3 B. & Ad. 406; Sinclair *v.* Bowles, 9 B. & C. 92.

[1] Pothier, Charte-Partie, n. 20; L'Ord. de la Mar. liv. 3, tit. 3, Fret. art. 2.

ing his dead freight. There is, in fact, little authority on this subject, and no controlling usage that we are aware of.[1] But, however this may be, it is the duty of the master, and the charterer has the right to require it of him, to obtain another cargo, if the charterer wholly refuses to employ the ship, and the freight thus earned is to be deducted from the sum claimed for the breach of the contract.[2] But the burden of proof is on the charterer to show that another cargo could have been obtained.[3] And the refusal of the captain to take other goods before the contract was broken by the charterer, will not make the captain responsible for the freight which might thus have been earned, if the contract was subsequently broken.[4] But the captain, after

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[1] See Abbott on Shipping, 249.

[2] Heckscher *v.* McCrea, 24 Wend. 304; Ashburner *v.* Balchen, 3 Seld. 262. Mr. Justice *Cowen*, in Shannon *v.* Comstock, 21 Wend. 457, states the law as follows: "If the party entitled to the benefit of the contract can protect himself from the loss arising from a breach at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omit to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable." See also, Wilson *v.* Hicks, Exch. 1857, 40 Eng. L. & Eq. 511. But if the charterer agrees to furnish a cargo at a certain rate of freight per hundred weight, it has been held that the master is not obliged to take the same cargo at a less rate and look to the charterer for the difference. Hyde *v.* Willis, 3 Camp. 202. In Crabtree *v.* Clark, U. S. D. C., Mass., 16 Law Reporter, 584, an action was brought to recover damages for breach of a charter-party. The libellant agreed to receive a cargo of salt from the respondents and bring it to Boston. The respondents stipulated to furnish the salt at Bonaire, and to pay freight upon it at the rate of fourteen cents a bushel. The charter-party also contained the following clause: "It is further understood and agreed that the master is to use the vessel's funds in payment for salt, which he is to purchase at the lowest cash price, and on the vessel's arrival at Boston the charterers are to pay the master or his agent the invoice cost of salt, export duty if any, and insurance on amount invested in purchase of salt from Bonaire to Boston and Boston wharfage, all in addition to the freight." The vessel went to Bonaire with funds to buy a cargo, but there was no salt there, and after remaining twenty-four hours, she left and returned to Boston in ballast. Held, that the respondents had broken the contract by failing to furnish the salt; that the libellant was not bound to wait longer than he did, unless there was ground to expect that a cargo might be obtained by further delay; that if any other cargo could have been obtained at Bonaire, to be brought to Boston as freight, the libellant would have been bound to have taken it, that the proceeds might diminish the damages; but that he was not bound to purchase a cargo on his own risk or to go to Curacoa, or to any other port in pursuit of business, and thus by a deviation, endanger his insurance. This case was affirmed on appeal. Clarke *v.* Crabtree, 2 Curtis, C. C. 87. But see Bailey *v.* Damon, 3 Gray, 92.

[3] Dean *v.* Ritter, 18 Mo. 182.

[4] Harries *v.* Edmonds, 1 Car. & K. 686.

the charterer has refused to load a cargo, should proceed at once to obtain another one, and not wait till the time expires during which the charterer had a right by the charter-party to put on board goods.[1] The cargo obtained by the captain after a refusal of the charterer to load, will not be the property of the latter.[2]

It may be a question who owns the freight thus earned by the master's act, if it be more than the stipulated freight. We apprehend it ought to be determined by the further question, whether the charterer had, by word or act, renounced the right of filling the ship or not. If certainly not, the presumption of law should be, that the master in filling the ship acted as his

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[1] Bright *v.* Page, cited 3 B. & P. 295, note; Heckscher *v.* McCrea, 24 Wend. 304, 309. But in Avery *v.* Bowden, 5 Ellis & B. 714, 33 Eng. L. & Eq. 133, affirmed 6 Ellis & B. 953, 38 Eng. L. & Eq. 130, where the charterer told the master he had no cargo and he had better go away, it was held that this was not such a refusal to load as would entitle the ship-owner to sue for breach of the contract. And in Barrick *v.* Buba, 2 C. B. N. S. 563, the same rule was applied to a case where the agent of the charterer said he had ceded the charter-party with all its rights and obligations to a third party, and the master was requested to look to him for a cargo. In both of these cases the contract was put an end to by war before the lay days had expired. In Matthews *v.* Lowther, 5 Exch. 574, an action was brought by a charterer against the owner of a vessel for breach of the charter-party. By this instrument it was stipulated that the ship should proceed to two ports in Sicily, or usual place of loading, and after delivery of her outward cargo, load from the factors of the plaintiff there a full cargo, and thence proceed to Bristol, and that the vessel should receive her orders before leaving Messina. The declaration, after averments, that the ship arrived at Messina, and a general allegation of performance by the plaintiff, assigned as a breach, that the defendant, within a reasonable time after the delivery of her outward cargo, and before the plaintiff could have given orders for the ship to proceed to the said ports, made a contract with a third party for the conveyance of goods from Messina, and therewith and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London without taking on board the cargo agreed to be taken from the plaintiff, and thereby deprived him of the power of fulfilling the charter-party, although within such reasonable time he had provided merchandise, and was ready to load it, and although he was ready and willing to have given orders to proceed to two ports, and to have there loaded a full cargo. On demurrer the declaration was held bad, as it did not show that the vessel had sailed before the lapse of a reasonable time for the performance by the plaintiffs of their part of the contract, and so did not show that the defendant had incapacitated himself from performing his part of the contract; and that it ought to have contained an averment that the plaintiff had performed his part by giving orders, etc., and by tendering a cargo within such reasonable time. *Alderson*, B., said: "The defendant did not, by loading his vessel with a third party's goods, incapacitate himself from performing the original charter-party, for he might have unloaded the vessel, and have been ready within a reasonable time to perform his engagement with the plaintiffs."

[2] Lidgett *v.* Williams, 4 Hare, 456.

agent, and that the profit thence arising should be his. If, however, he had as it were abandoned the empty space to the owner, then it might be held that the master acted as the owner's agent, and filled it on his account, releasing the charterer from his obligation to pay, and giving the freight earned to the owner.[1] And if there is a special agreement made that in case of failure to load the return cargo, the freighters will pay a gross sum less than the amount of freight per ton; the master, on the failure to load, will be entitled to the gross sum and also to the freight which the ship may earn by taking on board another cargo.[2] If the ship-owner takes goods on board with the consent of the charterer in that part of the vessel reserved for the use of the officers and crew, he can maintain an action against a shipper, for the freight thereof.[3] And it seems that he may

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[1] Kleine *v.* Catara, 2 Gallis. 61. In this case a part of a ship only was chartered by the plaintiff for a voyage from Havana to the United States. Freight was to be paid at the rate of one dollar per quintal of one hundred and twelve pounds net weight on delivery of the cargo in the United States. The owner of the vessel was to send out wine on the outward voyage, on which the plaintiff agreed to advance two thirds of its value, if it could not be sold on its arrival at Havana. The plaintiff wrote to his supposed agent in Cuba to attend to all the stipulations in the charter-party. This he refused to do, but loaded a cargo on the account of, and consigned to strangers to the charter-party. With this cargo the ship sailed, was captured, and released, and finally arrived in Boston. The freight of this cargo amounted to about $5,000 more than that stipulated for in the charter-party. The plaintiff thereupon brought this action to recover the excess. The court held that the contract was put an end to by the failure of the plaintiff to perform his part of the agreement, and that what the captain did, was as the agent of the owner, and for his benefit, more especially as the charterer was not owner for the voyage.

[2] Bell *v.* Puller, 2 Taunt. 285. See also, Puller *v.* Staniforth, 11 East, 232; Puller *v.* Halliday, 12 East, 494. In Brown *v.* Putnam, 2 Met. 275, the defendants agreed with the plaintiffs, the owners of a vessel, to furnish funds to fill eleven twelfths on a joint adventure. The funds not being sufficient, the master obtained goods to fill the deficiency from the consignee, and the defendants received the freight. Held, that the plaintiffs were entitled to it, but as the amount was greater than would have been earned at the current rate, and was allowed by the consignee at such rate, instead of a return commission, which he would have allowed, and which, by agreement, would have belonged to the defendants, they were entitled to deduct it from the freight.

[3] In Neill *v.* Ridley, 9 Exch. 677, 28 Eng. L. & Eq. 436, by the charter-party it was agreed that (the cabin and state-rooms, and sufficient room for cables, ship's stores, etc., throughout the charter-party being excepted) the vessel should take on board from the charterers (who were to have the full reach of the vessel's hold from bulkhead to bulkhead, including the half deck) a full and complete cargo, etc. That such goods only as the charterers might direct should be received on board the said vessel; and that no goods were to be received in the cabin, or any part of the vessel, without the consent of the charterers. Held, that under this charter-party the deck remained in the posses-

take on board any goods, unless forbidden by the charter-party, which will not enter into competition with the goods of the charterer.[1]

SECTION III.

OF THE LIEN OF A CHARTERED SHIP ON HER CARGO FOR THE FREIGHT.

The ship has a lien on the goods she carries for their freight; such, we have repeatedly said, is the general rule; and it is also a favored rule, the policy of the law-merchant binding the ship to the goods, and the goods to the ship, for their mutual benefit, and for the general advantage of commerce.[2] Nevertheless it has been made a question, whether, if an owner let his ship to hire by charter-party, he did not thereby give up his possession so far, that he could have no lien on the cargo for his freight. Much confusion has arisen in the English courts, which have extended in some measure, at least, to our own.[3]

This confusion and difficulty have arisen from the case of Hutton *v.* Bragg,[4] which was wrongly decided, and from the application of the common law rule that possession is necessary to lien. Abbott (Lord Tenterden), even, in his work on shipping,[5] says, "where there is no possession, actual or constructive, there can be no lien." But this rule is applicable in admiralty, and as we think in commercial law, only so far as it rests on reasonable grounds. We have already had occasion to speak of it in considering the question whether there is a lien for freight when a bill of lading provides that the freight is to be

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sion of the owners, and they could maintain an action for freight against a person who shipped cattle on board thereof, with the consent of the charterers, the shipper making a verbal promise to the master to pay the general owners.

[1] Thus, in Towse *v.* Henderson, 4 Exch. 890, it was held, that he might take merchandise for freight in the place of ballast, provided it did not occupy more space than ordinary ballast.

[2] See ante, p. 124, note 1; p. 125, note 1; p. 145, note 1.

[3] See ante, p. 233.

[4] 7 Taunt. 14. See also, p. 233, n. 1.

[5] Page 288.

paid *after* delivery.[1] We consider that in this country this question in relation to charter-parties is, for all practical purposes, settled, and settled in conformity with reason and justice.

The rule we take to be this. If the charterer takes possession of the ship, puts on board a master and crew and pays them and provisions the vessel, he does not bargain for the carriage of his goods, but hires the ship and takes her to himself, and becomes the quasi owner of her, as long as he thus holds her.[2] The general owner now carries no goods for any one; and it is nothing to him whether his ship carries goods or not; and if she carries them it is not *as* his ship, and he has no lien on the goods for his freight,[3] and, as we have seen,[4] incurs no liability if they are lost, and this although the charterer is an infant, because the contract between the owner and charterer is in such a case voidable only and not void.[5] Nor are the owners of a chartered vessel liable for wharfage.[6]

If a charterer chooses to carry goods for others, he, as owner for the time, has a lien on these goods for the freights payable to him.[7] But if the original owner is in possession, his bargain is to carry the goods of the charterer for the money to be paid him; he has, by his servant the master, perpetual possession of the ship, and so of the cargo laden on board of her; and he may retain this possession by his lien on the cargo for his freight, and payment to the charterer by a shipper who puts goods on board will be no defence to an action by the owner.[8] But payment to the owner will, in such a case, be a good defence to an action against that shipper by the charterer.[9]

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[1] See ante, p. 125, n. 1.

[2] Vallejo *v.* Wheeler, 1 Cowp. 143; Marcardier *v.* Chesapeake Ins. Co. 8 Cranch, 39; Lander *v.* Clark, 1 Hall, 355; Pickman *v.* Woods, 6 Pick. 248; Clarkson *v.* Edes, 4 Cow. 470; Drinkwater *v.* Brig Spartan, Ware, 149; The Phebe, Ware, 263, 265; Belcher *v.* Capper, 4 Man. & G. 502.

[3] Drinkwater *v.* Brig Spartan, Ware, 149; Marquand *v.* Banner, 6 Ellis & B. 232, 36 Eng. L. & Eq. 136.

[4] Ante, page 112, note.

[5] Thompson *v.* Hamilton, 12 Pick. 425.

[6] Philadelphia *v.* Naglee, 1 Ashm. 37.

[7] Lander *v.* Clark, 1 Hall, 355.

[8] Clarkson *v.* Edes, 4 Cow. 470; Ruggles *v.* Bucknor, 1 Paine, C. C. 358. See also cases, ante, p. 241, note 2.

[9] Holmes *v.* Pavenstedt, 5 Sandf. 97.

If, however, the charterer is in possession of the ship, then payment of freight by the shipper to the charterer would discharge the lien of the owner, certainly if it were paid without notice of the claim and lien of the owner; and we incline to think it would have this effect even with notice, because the owner has authorized by such a charter-party other persons to contract in this way with the charterer.[1] And it is quite clear and well settled, that the owner's lien extends only to the amount actually due from the shipper to the charterer by their contract, although this be less than the amount due from the charterer to the owner.[2]

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[1] If the charterer is in possession, and freight is paid to the master, who delivers it to the owner, the master will be liable in an action, brought against him by the charterer, for money had and received. Lander *v.* Clark, 1 Hall, 355. See also, Shaw *v.* Thompson, Olcott, Adm. 144. The facts of this case were somewhat peculiar. The action was *in personam* against the respondents to recover three hundred and fifty dollars, claimed to be due for freight on goods consigned to them. The vessel was chartered to one Stearns, the owner retaining the command, on a voyage from New York to Cuba and back. On the return voyage, goods were shipped consigned to the respondents, for which the freight alleged to be due was payable. The bill of lading contained the clause that freight was payable to the consignees. On arrival, notice was given to the respondents that freight was to be paid to the master or owner. The charterer was indebted on the charter-party more than the amount of freight payable on that shipment. The respondents were willing to pay over $258.10 to whomsoever it belonged, but claimed a right to retain $91.90, which they alleged was due to them from the charterer. The sum of $258.10 was subsequently, but before this action was brought, paid over to the charterer by the consent of the libellant. Held, that as to this, the owner of the vessel had no claim against the respondents, but that he could recover the $91.90.

[2] We have seen, ante, p. 241, n. 2, that where a vessel is chartered and the master appointed by the owner, the master cannot sign bills of lading for a less amount than the freight stipulated for in the charter-party, in behalf of the charterer, or one having knowledge of the charter-party. But where the shipper acts in good faith, and has no knowledge of the charter, we apprehend it is well settled that the general owner has no lien except for the amount stated in the bill of lading. Paul *v.* Birch, 2 Atk. 621; Faith *v.* East India Co. 4 B. & Ald. 630; The Sch. Volunteer, 1 Sumner, 551, 573, per *Story*, J. In Christie *v.* Lewis, 2 Brod. & B. 410, the general owner claimed only the freight due on the bills of lading, and the only question was whether the ship was so let to the hirer that he had no lien. In Mitchell *v.* Scaife, 4 Camp. 298, it was held that a *bonâ fide* indorsee of a bill of a lading, who took it without knowledge of the charter-party, was obliged to pay only the freight due as per bill of lading. So in Howard *v.* Tucker, 1 B. & Ad. 712, the same principle was applied in the case of an indorsee of a bill of a lading which stated that the freight had been paid. See also, Gilkison *v.* Middleton, 2 C. B. N. S. 134, 40 Eng. L. & Eq. 295; Gledstanes *v.* Allen, 12 C. B. 202, 22 Eng. L. & Eq. 382, ante, p. 242, note. In Small *v.* Moates, 9 Bing. 574, it was held that where the charter-party expressly reserved a lien on all goods laden on board, and goods were once shipped on board by the charterer,

And if a vessel is let on shares to the master, the owners cannot maintain an action for the freight;[1] and they are not, on the weight of authority, liable for the wages of the crew.[2]

We have seen that the charter-party usually provides expressly, that the owner binds the ship and freight to the performance of his part of the bargain, and the shipper binds the cargo to the ship for his performance. But, without these expressions, the law-merchant creates, or implies, this mutual obligation, in every case of a contract of affreightment, whether by bill of lading or charter-party.[3] If, however, the parties choose to stipulate other-

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the lien of the owner attached for all the freight due under the charter-party, and that this lien would not be devested even by a sale of the goods to a third party without notice of the stipulations in the charter-party, and that if the master gave bills of lading to the vendee, and they were indorsed by him for a valuable consideration, the indorsee could not obtain possession of the goods at the end of the voyage by a tender of a reasonable freight for their carriage. The court, however, admitted the general principle that an owner has a lien on goods shipped by a third party only for the freight due on them.

[1] Manter *v.* Holmes, 10 Met. 402. But in Sims *v.* Howard, 40 Maine, 276, where the master sailed the vessel on shares, paying one half the pilotage and all extra expenses, the captain paying the crew and victualling the vessel, the court held that the master did not have such absolute control of the vessel as precluded the owners from suing for freight.

[2] In Skolfield *v.* Potter, Davcis, 392, which was an action against the owners by seamen for their wages, the defence was that the vessel was let on shares to the captain. *Ware*, J., expressed his dissatisfaction with the modern cases so far as they hold the owners discharged where the parties furnishing supplies had no notice of the agreement at the time, and refused to extend the doctrine to the case at bar. The language of the learned judge in this case would go to the extent of holding the owners liable in all cases for the wages of seamen, but the case was decided partly on other grounds. The rule as laid down in the text is supported by McCabe *v.* Doe, 2 E. D. Smith, 64, in which case the master was a part-owner but hired by the charterers, and by Giles *v.* Vigoreux, 35 Maine, 300, where the court said: "In the case of Skolfield *v.* Potter, there was a special promise made by the owners to the plaintiff to pay the order drawn on them in his favor by the master when it was presented, and the freight earned on the cargo brought home was collected by one of the owners and retained in his hands. These facts might warrant the decision in favor of the plaintiff, although the vessel was let to the master on shares." See also, Aspinwall *v.* Bartlet, 8 Mass. 483. And Mr. Justice *Curtis*, in Webb *v.* Peirce, 1 Curtis, C. C. 104, speaking of Skolfield *v.* Potter, said: "There are elements in that case upon which the decision may rest consistently with the principles upon which this case has been decided; and I do not intend to express any opinion as to a claim for wages on a general owner who has received freight earned in the voyage for which wages are claimed."

[3] See ante, p. 124, 125. The Brig Casco, Davcis, 184. It is, however, always safer for the owner to make a special contract that he shall have a lien for the freight whatever be the provisions of the charter-party. See Small *v.* Moates, 9 Bing. 574. Whether

wise; as, that there shall be no lien; or, that the lien shall be other than it usually is, they may do so.

We have already given some consideration to the question, whether a master, who delivers the goods without insisting upon and obtaining the payment of freight, to which he is entitled, from the consignee, can fall back on the shipper. The cases, as we have seen, are in some conflict; but, on the reason of the question, and perhaps on the weight of authority, we should come to this conclusion: That the master should collect his freight from the consignee if possible, and should insist upon his lien if necessary for that purpose; but that this obligation is not so peremptory that he loses all right to his freight if he fails in it; because the clause, requiring the consignee to pay on delivery, which asserts the lien of

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the general clause, which is usually inserted in the charter-party, amounts to such a special contract, has been disputed. The better opinion seems to be, that it does. Lord *Tenterden*, in his Treatise on the Law of Shipping, p. 286, speaking of this clause, said: "The clause whereby the merchant binds the cargo, does not give to the owner a lien on the cargo by way of general security for the performance of the covenants in the charter-party, nor for any payment for which he might not detain it in the absence of such a clause, so that with us the clause is inoperative. In the cases where a lien is allowed it is not derived from this clause, but either from some general principle of law, or some special contract." In The Schooner Volunteer and Cargo, 1 Sumner, 551, 572, the question as to what effect was to be given to the clause, came up before Mr. Justice *Story*. And that learned judge, after referring to Lord Tenterden's remarks above cited, expressed a very strong opinion in favor of considering the above clause as constituting a special contract giving or reserving the lien. There is also a strong *dictum* of *Parker*, C. J., to the same point, in Pickman *v.* Woods, 6 Pick. 248, 252. "And it is also most usual to stipulate that the goods are bound for the freight, or that freight shall be paid or secured on delivery; and in all such cases the lien is considered perfect, notwithstanding there are covenants in the charter-party for the payment of freight." The charter-party, in the case of Howard *v.* Macondray, S. J. C., Mass., Nov. T. 1856, contained this clause. In delivering the opinion of the court, *Dewey*, J., spoke of it as follows: "Although it may have no efficacy in securing a lien on the merchandise at the port of delivery, where, by the terms of the contract, the freight is to be paid elsewhere, and at a time different from the delivery of the cargo, yet it may have its full effect in reference to freight to be paid at the place of delivery of the goods, and may operate and have full effect under the new stipulations entered into by these parties, as to the time and place of making the second payment for freight. It furnishes evidence at least, that the parties to the charter-party intended to secure the usual maritime lien, which exists where not displaced by the existence of inconsistent stipulations, and should lead us very carefully to consider whether the usual maritime lien for freight did not exist upon this cargo at the port of delivery. It is to be borne in mind that such lien will exist unless clearly displaced by the terms of the contract between the parties as to the payment of freight."

the master, is intended primarily for his protection and benefit, but not altogether so; and if he gives up the goods in good faith, and afterwards is unable to collect the freight of the consignee, he cannot call on the consignor if the goods belonged only to the consignee, and the consignor was but his agent or factor in the transaction, but may call on the consignor if the goods were his property.[1]

We should apply this rule equally to the case of a charter-party, and of freight under bill of lading only. For if the consignor own the goods, he is not harmed by being obliged to pay the freight, because he would have been obliged to repay it to the consignee had the master obtained it from the consignee. And this reason may perhaps suggest the only exception; and that is, where the consignor, in good faith and without notice from the master or owner, has, by reason of the laches of the master, paid the consignee for the freight, or so changed the state of his accounts with him, that he would lose the freight if obliged to pay it to the master.[2]

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[1] See ante, p. 221, note 3.

[2] In Tapley *v.* Martens, 8 T. R. 451, the consignor requested the consignee to pay the freight as he was indebted to him in more than the amount. The consignee, instead of doing this, drew a bill of exchange on the consignor for the freight, and delivered it to the captain. The consignor was held liable for the freight. So in Collins *v.* The Union Transp. Co. 10 Watts, 384, the plaintiffs in error purchased goods in Philadelphia. They were carried by the line of the defendants in error to Pittsburgh, consigned to H. & L., merchants there, to be forwarded by them to the plaintiffs. The bills of lading given by the defendants stated that freight was to be paid on delivery to H. & L. They were delivered, however, without payment. H. & L. never paid the freight, but drew upon the plaintiffs for the amount, and the draft was paid at maturity. The plaintiffs were nevertheless held liable. The cases above cited show that the mere fact of the consignor having advanced the money to the consignee to enable him to pay the freight, or a subsequent settlement with him, will not relieve the consignor, if he would be otherwise liable, from his responsibility to the party, who has contracted to carry his goods. But if the master, or the owner of the vessel, neglected to sue the consignor, and in consequence of such delay, the consignor, supposing the consignee had paid the freight, should settle with him on that basis, we should strongly incline to the view that the consignor would not be liable.

SECTION IV.

OF THE PAYMENT BY A CHARTERER.

If the master receives the freight, not in cash, but in a bill or note which turns out to be valueless, he cannot then, perhaps, call on the consignor or consignee, in those States (as Massachusetts and Maine)[1] where negotiable paper is *primâ facie* payment of the debt for which it is given, and not anywhere, if he voluntarily elects to receive payment of the freight in this way. But if he receives bills or notes for his freight because he can get nothing else, — and whether it be so or not seems to be a question for the jury, — then, if they are dishonored, his claims against the consignee or consignor, revive.[2]

As the current of authority in this country gives the master a lien on the freight, not only for his disbursements for the ship, but for his own wages also, — on both points differing from the English law,[3] — it should follow that payment of freight by the shipper to the owner, would not be available as a defence against a demand of freight from the shipper by the master, provided the master had notified the shipper of his claim, and requested him not to pay over the freight, or at least to reserve as much as would satisfy the master's claim.[4]

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[1] See 2 Parsons on Contracts, p. 136; and ante, p. 93, note 1.

[2] In Tapley *v.* Martens, 8 T. R. 451, the consignor was held liable. But the court said: "If the fact had been, as supposed in argument by the defendant's counsel, that the consignee had been ready to pay in money and the plaintiff had taken this bill for his own accommodation, there would have been some weight in the argument, but the fact was otherwise." So if the plaintiff had been guilty of any negligence, after he had taken the bill, in not endeavoring to enforce payment of it. See also, Marsh *v.* Pedder, 4 Camp. 257, 262; Grant *v.* Wood, 1 Zabris. 292. In Strong *v.* Hart, 6 B. & C. 160, it was held, that an instruction that the jury should find for the defendants if they thought that the captain took the bill voluntarily and for his own convenience, was correct; and that the defendants were not bound to prove that an offer was made to pay in cash. See also, Anderson *v.* Hillies, 12 C. B. 499, 10 Eng. L. & Eq. 495.

[3] See post, ch. 11, § 2.

[4] White *v.* Baring, 4 Esp. 22. But see Atkinson *v.* Cotesworth, 3 B. & C. 647, 5 Dow. & Ry. 552. In this country the law is, as stated in White *v.* Baring. See Lewis *v.* Hancock, 11 Mass. 72. In Ingersoll *v.* Van Bokkelin, 7 Cow. 670, 5 Wend.

The master can retain the goods against a purchaser; and if part be delivered, he can retain the residue; and he may retain any part of the goods belonging to one person, for all the freight due from that person. But if the consignee sells the goods to different purchasers, and the part sold to one is delivered to him, the master can retain the residue, which belongs to other purchasers, only for the freight due on that residue, and not for the freight due on the part delivered. Such at least is the doctrine laid down by all who have treated of this subject, confirmed as we suppose by practice, and resting upon one adjudicated authority at least; but in a recent case the English courts cast some doubt upon it.[1]

315, a bailee with whom the master had deposited the goods, was held liable for them in trover, he having delivered them over to the consignee by order of the owner of the ship, to whom the consignee had paid the freight.

[1] In Sodergreen *v.* Flight, cited in Hanson *v.* Meyer, 6 East, 622, the action was brought by the captain of a ship to recover freight on 850 barrels of tar, which had been shipped by one Hippius. He sold the barrels to the defendants before the ship arrived. After arrival 721 barrels were delivered, when, Hippius having stopped payment, the captain refused to deliver the rest, unless they would pay the freight, not only of what remained, but of what had been before delivered, which they refused to do. Subsequently it was agreed that the whole cargo should be delivered up, and an action brought for the freight. Lord *Kenyon* held that the plaintiff was entitled to recover freight for the whole amount. The Reporter then adds: "His lordship being of opinion that the captain had a lien on the tar remaining on board for the whole freight, as well the freight of the barrels delivered as of those remaining on board, belonging all to the same person and under one consignment. But he thought that if Hippius had sold the tar to different persons, the captain could not have made one pay for the freight of what had been delivered to another." On the authority of this case, it has been laid down in all the works on the law of shipping, that a captain, if he delivers part of a cargo, has a lien on the rest, for the freight of the whole, provided it belong to one person. By the bills of lading in this case, the tar was deliverable unto order, "he or they *paying freight for the said goods.*" The question of the lien of the captain did not arise, the only point in dispute being whether the captain, having delivered the tar could recover freight from the purchaser, which seems under the circumstances not to admit of doubt. The precise question of the lien of the captain was decided in a late case in England. Möller *v.* Young, 5 Ellis & B. 7, 30 Eng. L. & Eq. 345. The plaintiff, being the owner and master of a ship, sued the defendants for not accepting goods transported in his vessel in a reasonable time. The defendants were indorsees of a bill of lading, by which the goods were deliverable to them, on payment of freight, as per charter-party. This latter instrument provided that the cargo should be delivered on payment of freight, and that freight should be paid on delivery of the cargo. On the arrival of the vessel, a portion of the cargo was delivered. The plaintiff refused to deliver the rest till freight for the part already delivered had been paid, and the defendant refused to pay any freight till the whole had been delivered. Ten

If the voyage for which the vessel is chartered, be, as it often is, a double voyage; that is, a voyage out and home; the question occurs whether any freight is due if the vessel safely performs the outward voyage and delivers her cargo, but is lost before her return home. It is perhaps impossible to give any general rule which shall always answer this question, because each case must be judged of by itself; and these cases, as they are presented in the books, often involve questions of mingled fact and law which are sometimes of great difficulty. There is nothing to prevent the parties from making such a bargain, on this point, as they choose to make. They may say distinctly, that so much freight shall be paid if she performs one passage in safety, so much if another, and so on for the rest; or they may agree that nothing shall be payable by way of freight, unless she performs all of them, and brings the last cargo home in safety. And the question always is, which of these two things did they mean to express by the words which they used.

There is perhaps some tendency in the courts to look upon such voyages as distinct, especially if the shipper or charterer derives a distinct benefit from each voyage, and receives his goods at the end of each with their value enhanced by the carriage; and in such a case, nothing but plain language, providing that no freight shall be earned unless the whole voyage, or all

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days, beyond the running days mentioned in the charter-party, elapsed before the plaintiff would consent to deliver the rest of the cargo. As soon as this was done, the defendant paid the freight for the whole. The Court of Queen's Bench held that the plaintiff was entitled to recover on the ground that the master was not bound to deliver the whole till he was paid for that already delivered, and that a delivery of a part did not waive the lien as to the residue. This decision was reversed by the Court of Exchequer Chamber, 5 Ellis & B. 755, 34 Eng. L. & Eq. 92. It was there held that the master might assert his right of lien, and refuse to deliver the goods until he was paid his freight, but that if he waived this right he was bound to deliver the whole cargo, and when this was done there was evidence of a contract on the part of the consignee to pay freight for the whole. It will be observed that in this case the consignee was not owner of the goods. In a case where he is, the law may be otherwise. In Bernal *v.* Pim, 1 Gale, 17, it seems to have been considered that a delivery of part does not defeat the lien as to the residue, but that if there are two contracts to carry for the same person, with different termini in each contract, no lien attaches for freight under the one upon goods shipped under the other. Sodergreen *v.* Flight was also fully sustained in Boggs *v.* Martin, 13 B. Mon. 239. And see Fuller *v.* Bradley, 25 Penn. State, 120; Barnard *v.* Wheeler, 24 Maine, 412.

the passages be duly performed, would suffice to destroy the owner's claim for freight *pro ratâ*.[1]

As it is the owner's duty (unless otherwise stipulated) to keep the ship in good repair, he not only may, but must, use sufficient time for that purpose; and during that time the charterer pays as for any other part of the period for which he hires the ship.[2] And if the charterer has possession of her, it is his duty to see that she is kept in repair, although the owner be ultimately liable to him for the expense. He must not abandon the ship as long as she is sea-worthy, or can be kept so, or made so by any reasonable efforts. And if the owner retains possession, the charterer must not take his goods out, or abandon the voyage, so long as the owner can keep her or make her fit for the voyage, unless he distinctly refuses, by word or act, to do so.[3]

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[1] The law is stated by Lord *Mansfield* as follows: "If there be one entire voyage out and in, and the ship be cast away on the homeward voyage, no freight is due, no wages are due, because the whole profit is lost; and by express agreement the parties may make the outward and homeward voyages one. Nothing is more common than two voyages; whenever there are two voyages, and one is performed, and the ship is lost on the homeward voyage, freight is due for the first." Mackrell *v.* Simond, 2 Chitty, 666. See also, Molloy, de Jure Mar. Book 2, ch. iv. § 9; Malynes, p. 98. In the following cases it was held that the voyages were distinct, and freight was payable for those performed. Mackrell *v.* Simond, *ut sup.*; Brown *v.* Hunt, 11 Mass. 45; Locke *v.* Swan, 13 Mass. 76. In the late case of Towle *v.* Kettell, 5 Cush. 18, the charter-party described the voyage from Boston to Wilmington, N. C., and from thence to Cape Haytien in the island of Hayti, and from thence back to Boston. The clause, relative to the payment of freight, was as follows: "for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say, fifteen hundred dollars, say so much in Hayti, as the master may want for the disbursement of the vessel, and the balance on the discharge of the cargo in Boston, together with all port charges, lighterage, and pilotage in Hayti." The master was to have what freight could be got from Boston to Wilmington. The vessel was lost on her return voyage from Hayti to Boston. The court held that the voyage was an entire one, and that no freight was due, that the provision for paying the master at Hayti what he might want for the disbursements of the vessel could not affect the construction of the instrument. In the following cases also, the voyages were held to be entire: Byrne *v.* Pattinson, in K. B. Trinity Term, 37 Geo. 3, Abbott on Ship. 466; Smith *v.* Wilson, 8 East, 437; Coffin *v.* Storer, 5 Mass. 252; Liddard *v.* Lopes, 10 East, 526; Scott *v.* Libby, 2 Johns. 336; Barker *v.* Cheriot, 2 Johns. 352; Penoyer *v.* Hallett, 15 Johns. 332; Burrill *v.* Cleeman, 17 Johns. 72; Blanchard *v.* Bucknam, 3 Greenl. 1; Hamilton *v.* Warfield, 2 Gill & J. 482. See also, Gibbon *v.* Mendez, 2 B. & Ald. 17; Crozier *v.* Smith, 1 Scott, N. R. 338; Sweeting *v.* Darthez, 14 C. B. 538, 25 Eng. L. & Eq. 326.

[2] Havelock *v.* Geddes, 10 East, 555; Ripley *v.* Scaife, 5 B. & C. 167.

[3] Kimball *v.* Tucker, 10 Mass. 192. In this case it was held that where the vessel

SECTION V.

OF DEMURRAGE AND LAY DAYS.

In all commercial and maritime affairs, time is an element of great value and importance. It should follow, therefore, that both parties should be punctual. If the ship is not ready when she should be, but a material delay seems to be probable, the charterer may seek another ship; if the cargo be not ready, the owner may seek another cargo.[1] If a vessel is chartered to load

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became unseaworthy during the voyage, the hirer could not stand still calling for repairs, but must provide whatever was necessary, at the expense of the owner, to enable the vessel to complete her voyage. *Sewall*, J., on page 196, said: "If the vessel, sufficient at the commencement of the voyage, be entirely lost in the course of it, the one must betake himself to another vessel, and the other loses his freight-money, but nothing more, upon the contract of charter-party. The hirer must not abandon the vessel, while he can keep her afloat, and suitably provided for the employment and destination for which she was hired: and the owner must be ready to pay all expenses and damages, necessarily incurred for the purpose." In The Agricultural Bank *v.* Barque Jane, 19 La. 1, it was held, that where a vessel was chartered, and put up as a general ship by the charterers, the shippers of goods could not maintain an action against the owners for damage done to their goods through the unseaworthiness of the ship, but that their action was against the charterers, though they in turn might recover from the owners whatever they might have to pay.

[1] Thus, in Weisser *v.* Maitland, 3 Sandf. 318, the charter-party provided that the charterer should be allowed for the loading and discharging of the vessel as follows: "Lay days, to load, twenty days from the twelfth." The owner guaranteed to have the vessel ready by that time. The charter-party was to commence when the vessel was ready to receive her cargo, and notice thereof given to the charterer. It was held, that the vessel's being ready on the day named, was a condition precedent to the charterer's liability to put on board the cargo. The court said: "Time was of the essence of the contract, and it is often so in commercial transactions. The success of the enterprise often depends upon dispatch. It was plainly the intent of these parties to be ready by the twelfth of April at all events. The cases show that the great principle to be considered is the intent of the parties, and where the time is essential, and the words of the charter-party are plain, as in the case here, we cannot doubt that the agreement, in reference to the day when the vessel was to be ready, is to be regarded as a condition precedent." See also, Shadforth *v.* Higgin, 3 Camp. 385; Glaholm *v.* Hays, 2 Scott, N. R. 471; Shubrick *v.* Salmond, 3 Burr. 1637; Soames *v.* Lonergan, 2 B. & C. 564; 2 Parsons on Contracts, 172. It was held, in Pope *v.* Bavidge, 10 Exch. 73, 28 Eng. L. & Eq. 569, that, where it was agreed that the ship should make six successive voyages, and that they should not be made later than the last day of February, 1853, a plea that during three voyages the ship sustained great damage from the dan-

at a foreign port and to proceed thence with the cargo to one of several other ports, it has been held that the master need not communicate with the charterer, and if orders are not sent within a reasonable time, he may proceed to either of the ports mentioned.[1] The ship-owner must perform the voyage in as short a time as is consistent with safety, and for any loss sustained by the charterer in consequence of the voyage being protracted by any culpable act of commission or omission, the owner is liable.[2] The charterer must load and unload with all reasonable despatch; and the owner must give him all reasonable facilities; and for non-performance of these obligations, on either side, the injured party may have his remedy, without any express stipulations.[3]

It is usual, however, to provide for all obligations of this kind, under the name of Demurrage. Sometimes it is provided that the ship shall be ready on a certain day, and if not, the charterer shall be allowed so much for every day that he is delayed. More often, and, indeed, almost always, it is provided that the charterer may have so many days for loading and for unloading the ship, and that he may detain her more, if he will pay so much for each additional day, or that if he detain her longer, he shall pay so much. If the whole charter be on time, there is no need of these provisions. If it be for a voyage or voyages, then these days, for which he pays nothing, are a part of the voyage. They are called lay days, and all belong to the charterer; he is under no obligation to receive the cargo until it suits his convenience, provided he do not exceed the specified number of the lay days for unloading; and if he does not receive it, and in the meanwhile it is lost by a peril of the sea, there is no delivery of the goods, no completion of the voyage, and no freight earned.[4]

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gers of the seas, which damage was necessary to be repaired before the ship could proceed on her fourth voyage, and that this could not be done before the last day of February, 1853, had elapsed, was no answer to an action for a breach of the contract.

[1] Sieveking *v.* Maass, 6 Ellis & B. 670, 36 Eng. L. & Eq. 185. Affirmed in the Exchequer Chamber, 6 Ellis & B. 674, 36 Eng. L. & Eq. 187.

[2] The Bark Gentleman, Olcott, Adm. 110, 1 Blatchf. C. C. 196.

[3] See Sweeting *v.* Darthez, 14 C. B. 538, 25 Eng. L. & Eq. 326; Harris *v.* Dreesman, Exch. 1854, 25 Eng. L. & Eq. 526; Clendaniel *v.* Tuckerman, 17 Barb. 184.

[4] Lacombe *v.* Waln, 4 Binn. 299; Brown *v.* Ralston, 9 Leigh, 532.

Nor is the charterer bound to furnish a cargo as soon as requested by the captain, but he can load it any time within the lay days.[1]

If words to a similar effect are written in the bill of lading, the reception of the goods by a party, under such a bill, would be evidence of an agreement on his part to pay the prescribed demurrage;[2] without this clause in the bill, however, there is no claim on the consignee for demurrage as such, although there may be a claim for damages caused by delay.[3]

Lay days, by the general rule, do not commence until the vessel has arrived at the usual place for unloading.[4] But where such place is a dock, it has been held that they begin when she enters the dock, and not when she reaches her place of discharge in the dock.[5] The parties may, however, stipulate as they

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[1] See ante, cases cited p. 248, note 1.

[2] See ante, p. 219, note 3.

[3] "Demurrage," so called, can be recovered only where it is reserved by the charter-party or bill of lading. The remedy, where no such express reservation exists, appears to be by an action on the case in the nature of demurrage, for damages, for the detention. Thus, in Kell *v.* Anderson, 10 M. & W. 498, Lord *Abinger*, C. B., said: "I thought, that as no time was limited by the charter-party from which the demurrage was to be reckoned, it must be reckoned from the time of the ship's arrival at the ordinary place of discharge; and that if she was prevented from discharging sooner by the default of the defendant, *that should have been the subject of an action on the case, and not of an action for demurrage.*" So *Harris*, J., in the recent case of Clendaniel *v.* Tuckerman, 17 Barb. 184, said: "It is true that demurrage, properly so called, is only payable when it is stipulated for in the contract of affreightment; but it is also true, that when a vessel has been improperly detained by the freighter or consignee of the cargo, the owner may have a special action for the damage resulting to him from the detention." See also, Horn *v.* Bensusan, 9 Car. & P. 709; Atty *v.* Parish, 4 B. & P. 104; Robertson *v.* Bethune, 3 Johns. 342. In Sprague *v.* West, Abbott, Adm. 548, it was held, that an action would lie against a consignee, who was also the owner of the goods, for detaining the ship beyond the proper time, although the bill of lading contained no stipulation as to demurrage, lay days, or detention. In Brouncker *v.* Scott, 4 Taunt. 1, the master of a ship brought an action to recover a compensation in damages for the detention of his ship beyond a reasonable time for the delivery of her cargo in the port of London, and declared also generally for demurrage. Held, that such an action could not be maintained by the master, whatever right the owners might have to sue in their own names. See also, Evans *v.* Forster, 1 B. & Ad. 118. But where the master is owner *pro hac vice* he may maintain the action. Clendaniel *v.* Tuckerman, 17 Barb. 184.

[4] Brereton *v.* Chapman, 7 Bing. 559; Kell *v.* Anderson, 10 M. & W. 498.

[5] Brown *v.* Johnson, 10 M. & W. 331; Gibbens *v.* Buisson, 1 Bing. N. C. 283. In Balley *v.* De Arroyave, 7 A. & E. 919, the vessel was to have ninety running days, and

please about the time when they shall commence.[1] And it sometimes depends on the usage of the port.[2]

A delay by capture, or embargo, or by any compulsion, gives no ground for a claim for demurrage, according to some authorities; because, for this, there must be a voluntary delay; such, at least, appears to have been once regarded as the general principle.[3] But the decisions on this question cannot be reconciled. On the whole, we prefer those which hold that the consignees shall, generally at least, pay demurrage, although no blame be imputable to them, provided the owner be not in fault.[4]

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ten days of demurrage from her arrival at W. being ready to unload and having received pratique. The declaration stated that the defendant did not unload and load the vessel, though she was ready and had performed pratique. Both of which averments were denied by the plea. It was proved that there was no quarantine or pratique given at W., or on that part of the coast, but that the vessel was ready to unload. It was held, that she must be taken to have received pratique, when she was at W., ready, and at liberty to unload, and that the lay days then commenced.

[1] Jackson *v.* Galloway, 5 Bing. N. C. 71. In this case, by the charter-party, the vessel was to load coals and iron at Cardiff, and proceed with them to Alexandria, the running days to commence on the sixteenth of December. By consent Pembroke was substituted for Cardiff. It was held, that the rest of the charter-party was not changed, and that the lay days commenced on the sixteenth, wherever the vessel might be.

[2] In Leidemann *v.* Schultz, 14 C. B. 38, 24 Eng. L. & Eq. 305, it was provided in the charter-party that the ship should proceed to Newcastle-on-Tyne, and should there be ready, forthwith, to take on board a complete cargo of four keels of coal, and the remainder coke, "in regular turns of loading." It was held, that the question, whether the vessel was loaded in a reasonable time, was to be decided with reference to the meaning of the term "regular turns of loading," as explained by the usage of the port. See also, on this point, Taylor *v.* Clay, 9 Q. B. 713; Hudson *v.* Clementson, 18 C. B. 213, 36 Eng. L. & Eq. 332; Nichols *v.* Jewett, U. S. D. C., Mass., Boston Daily Adv. March 23, 1857; Nichols *v.* Tremlett, Same Court, 20 Law Reporter, 324.

[3] Douglas *v.* Moody, 9 Mass. 548, 555, per *Sewall*, J. In Duff *v.* Lawrence, 3 Johns. Cas. 162, it was held, that a delay for quarantine did not give any claim to demurrage, but that where the vessel was not allowed to enter, by government, and the prohibition was permanent, the charterer should pay for the delay, especially as by the charter-party he might have gone to another port, although on payment of a higher freight.

[4] In Leer *v.* Yates, 3 Taunt. 386, a general ship took brandies on board, under bills of lading, which allowed twenty lay days for delivering the goods in London, and stipulated for £4 per day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks, until forty-six days after the lay days had expired. The delay in the unlading was caused solely by the act of the consignees of the uppermost goods, yet the consignees of the undermost were held liable. See also, Harman *v.* Gandolph, Holt, N. P. 35. So in Randall *v.* Lynch, 2 Camp. 352, 12 East, 179, the vessel could not be unloaded within the stipulated time on account of the crowded state of

And if principles assumed to be law in the modern cases are to be adopted, we should say that delay from the elements, as frost,[1] or tempest, or tide,[2] or from any act of government,[3] or from any

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the London docks, yet the freighter was held liable for the delay. Lord *Ellenborough* said: "The question is, whether the detention of the ship, arising from the inability of the London Dock Co. to discharge her, is, in point of law, imputable to the freighter; and I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. *He is responsible for all the various vicissitudes which may prevent him from doing so.*" But in Rogers *v.* Hunter, 2 Car. & P. 601, Moody & M. 63, Lord *Tenterden* was of the opinion that a defendant could not be said to detain a vessel, before he could get at his goods. So in Dobson *v.* Droop, 4 Car. & P. 112, Moody & M. 441, he said: "I am of opinion that, if a party cannot get his goods, he being prevented by a delay on the part of the owner of other goods on board the same vessel, he is not liable for demurrage. The question here is, whether the removal of the defendant's goods was obstructed by the misconduct of another in not removing his goods; for, if so, the defendant is not liable for demurrage." The weight of authority is certainly in favor of the cases first cited, and we are inclined to believe that they are the more correct in principle. The parties are at liberty to make any contract they please, and if they choose to stipulate that demurrage shall be paid at all events, there seems to be no reason why the consignees should not pay it, even though the delay is not occasioned by their fault, if the owner be not to blame, but if he is in fault then it is clear that the consignees will not be liable. Benson *v.* Blunt, 1 Q. B. 870; Taylor *v.* Clay, 9 Q. B. 713. So, generally, if an owner do not procure the necessary papers for the discharge of the ship, he cannot claim demurrage, but if the defendant request him not to procure them, the defendant cannot set up their not being procured in an action brought against him for demurrage. Furnell *v.* Thomas, 5 Bing. 188.

[1] Barret *v.* Dutton, 4 Camp. 333. But if the detention occur after the vessel is loaded, the charterer will not be liable. Pringle *v.* Mollett, 6 M. & W. 80. In Jamieson *v.* Laurie, 6 Bro. P. C. 474, where a British vessel was detained in St. Petersburg, to take on board her cargo, nearly two months beyond the stipulated time, and then setting sail, was driven back and frozen in for the winter, which began somewhat earlier than usual, demurrage was awarded only to the sailing of the vessel. And so, where, by the delay, the vessel lost the opportunity of sailing with convoy, and was obliged to wait nearly two months for another, the owner having covenanted that she should sail with convoy. Conner *v.* Smythe, 5 Taunt. 654. A similar rule was adopted where demurrage was stipulated to be paid whilst the ship was waiting for convoy. See Lannoy *v.* Werry, 4 Bro. P. C. 630.

[2] In Clendaniel *v.* Tuckerman, 17 Barb. 184, the vessel had arrived, and notice was given that the captain was ready to deliver the cargo. She was, however, detained by the consignee, and while waiting was capsized by a freshet, and the greater part of her cargo lost. Held, that the consignee was liable for demurrage. See also, Brown *v.* Ralston, 9 Leigh, 532.

[3] Bessey *v.* Evans, 4 Camp. 131; Hill *v.* Idle, id. 327. See also, Bright *v.* Page, 3 B. & P. 295, note. In Brooks *v.* Minturn, 1 Cal. 481, where a vessel was seized by the revenue officers, it was held that if the seizure was illegal no demurrage was due, so, if the seizure was legal, but occasioned by the fault of the ship-owner or his agent; but the court did not decide how it would be if the seizure had been occasioned by the

positive and certain disability of the consignee, although it could not be in any way imputed to his own fault, that is, neither to his own act, nor to his own neglect, should give claim to demurrage. But the parties may stipulate that the charterer shall be liable for no delay which is not caused by his own default.[1]

As a general rule the consignee takes the risks of roads and means of transportation from the dock, and is bound to take the cargo as fast as it is delivered to him from the vessel, but the owner of the vessel takes the risk of working weather, during the time required for the unlading.[2] The original purpose of the provision in regard to demurrage was first, to hold the charterer to a proper endeavor to save time, and next, to make him pay a proper compensation for all the time of the owner which he might have saved but did not. For a similar reason, if any delay, for which he is not answerable, occurs after the lay days should have begun, these days do not always begin to count from the first day when he can work. Suppose he has forty days to unload the cargo and put on board a new one; and there is a compulsory delay of ten days after these lay days should have begun. If he can now, without extraordinary and unreasonable effort and cost, unlade and lade in thirty days, he must do it; for he has forty days still from the actual beginning of his work, only if the whole of the forty are necessary for the work.[3]

It is usual to call lay days "working days,"[4] or to define them by some similar epithet; but in the absence of such language, and of any language of an analogous meaning, the law-merchant would, we think, define the mere word "days," as

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fault of the consignee. It has been also held, that the indorsee of a bill of lading is liable for demurrage occasioned by his not being notified of the ship's arrival, the court holding that, although it is a convenient practice to give notice, yet it is not binding on the ship-master to do so. Harman *v.* Clarke, 4 Camp. 159; Harman *v.* Mant, id. 161. So demurrage was allowed where the delay was owing to a prohibition of intercourse between the ship and the shore, on account of infectious disease. Barker *v.* Hodgson, 3 M. & S. 267.

[1] Towle *v.* Kettell, 5 Cush. 18.

[2] Sprague *v.* West, Abbott, Adm. 548.

[3] Rogers *v.* Hunter, 2 Car. & P. 601, Moody & M. 63.

[4] Brooks *v.* Minturn, 1 Cal. 481.

"running days," and not as "working days,"[1] unless there was some special usage to the contrary.[2]

If, besides the stipulated lay days, the charter-party provides that the charterer or consignee may detain the vessel, at so much a day for a certain period, the master is bound to wait during that whole period if the consignee requests him to do so. But when it expires he may go at once; and if he still delays, and then receives a cargo from the consignee, the consignee would certainly be bound to pay for these additional days, if he had requested the master to remain;[3] and also, we think, if he had made no special request, but had profited by them to put his cargo on board, because the law would imply that the master waited by reason of an understanding with the consignee, and at his request.

If days are to be paid for after and beyond all those provided for, compensation is to be made on the principle of indemnity to the owner of the ship; and the rate for the days agreed on, would not be conclusive as the measure of damages, although it might be evidence.[4]

If the charter be on time, it would seem that the charterer is liable for all the time lost by detention, or embargo, or capture, unless and until the vessel is condemned as prize, for this latter fact dissolves the contract. There must, however, be some limit to this in every case of hostile or public seizure or arrest, although no adjudged cases enable us to lay down the limitation with much distinctness. In the absence of any more definite rule,

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[1] Brown *v.* Johnson, 10 M. & W. 331; Brooks *v.* Minturn, 1 Cal. 481; Cochran *v.* Retberg, 3 Esp. 121, per Ld. *Eldon*, C. J.

[2] And where the law of the country of the port of discharge prohibits working on Sundays or holidays, they will be excluded. Cochran *v.* Retberg, 3 Esp. 121. See also, Gibbens *v.* Buisson, 1 Bing. N. C. 283, per *Bosanquet*, J. But in Field *v.* Chase, Hill & Den. 50, it was held to be no defence against the payment of demurrage that the ship arrived at Cuba during the Easter holidays, and that according to the usage of the place, the custom-house was closed, and the ship could not be entered nor permission obtained to unload, running days being held to include Sundays and custom-house holidays.

[3] Jamieson *v.* Laurie, 6 Bro. P. C. 474. See also, Robertson *v.* Bethune, 3 Johns. 342; and p. 248, n. 1, ante.

[4] Moorsom *v.* Bell, 2 Camp. 616; Randall *v.* Lynch, id. 352.

we should say that, whatever circumstances would suffice to break up the voyage, would suffice to terminate the charter-party, and the liability of the charterer.[1]

SECTION VI.

OF THE CONSTRUCTION OF CHARTER-PARTIES.

Although the parties may enter into what stipulations they please, the effect of their stipulations often depends on the legal construction of the instrument which contains them. This construction is always made by the court, and questions relating to it are questions of law and not of fact.[2] All courts, in construing any instrument, pay great regard to the intention of the parties. This is to be gathered, if possible, from the words they use, aided by whatever evidence is admissible. And if the intention can be ascertained, it is carried into effect, provided the words used will bear this interpretation without any violation of the rules of legal construction.[3]

One of the questions of this kind which occurs most fre-

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[1] Minot *v.* Durant, 7 Mass. 436. A ship was chartered for a voyage from Portland to St. Croix, and back to the United States twice. The defendant covenanted to pay at a certain rate per ton, per month, during the time the vessel should be employed. The vessel sailed from St. Croix where she arrived, and discharged her cargo, and from thence sailed for Wilmington in South Carolina. Here she was detained by an embargo thirteen months and twelve days. After being released she performed another voyage to the West Indies, and back to Portland, where she was returned to the owner. The defendant claimed to be entitled to deduct the hire during the time of the detention, but the court held that he was bound to pay for the whole time the vessel was in his employ. See also, Brown *v.* Hunt, 11 Mass. 45; Spafford *v.* Dodge, 14 Mass. 66, 71; Odlin *v.* Ins. Co. of Penn. 2 Wash. C. C. 312; The Nathaniel Hooper, 3 Sumner, 542; Patron *v.* Silva, 1 La. 275; Bork *v.* Norton, 2 McLean, C. C. 422; M'Bride *v.* Mar. Ins. Co. 5 Johns. 299; Palmer *v.* Lorillard, 16 id. 348; Baylies *v.* Fettyplace, 7 Mass. 325; Hadley *v.* Clarke, 8 T. R. 259; and post, p. 273. If the charterer agrees to pay a certain price in case of capture and condemnation, the declaration must show where, when, and by whom the vessel was captured, and that the court, which condemned her, had jurisdiction. Stone *v.* Patterson, 6 Call, 71.

[2] 2 Parsons on Contracts, 4, 5.

[3] 2 Parsons on Contracts, 6.

quently, in contracts relating to shipping, is whether a covenant be a condition precedent, or an independent covenant. That is, whether a promise made by one party be such, that if he breaks it, this breach is a sufficient excuse for the entire disregard of all his promises by the other party; or is it such, that if he breaks it, the other party is still bound to his promises, but may claim indemnity from him who has broken his promise.[1]

Thus, if an owner contracts that his ship shall go to Liverpool, and there take and bring to Boston a full cargo for the shipper, who agrees to pay him thirty dollars a ton, and the ship, when three fourths laden, sails without sufficient reason, although the shipper has the remaining fourth ready to be put on board, if the promise to take and bring a full cargo is a condition precedent to recovery of freight, the condition having failed, the owner can recover nothing. If it is an independent promise, and the promise to pay thirty dollars a ton another promise, then the owner can claim this freight for all that he brought, and the shipper must pay it; but may still have his action, or his offset, for any damage he sustains by reason of the ship sailing with only part of his cargo.[2]

If the covenant or promise be a condition precedent, the consequence of a breach is that the whole obligation fails on the other side. Hence the first, and indeed the only rule, which is of much utility in questions of this kind is, that if the covenant or promise is inseparably connected with the whole of the consideration on which it rests, then it is a condition precedent; but if that consideration can be divided into parts, and the promise which is broken can be made to attach to some part, and the promise that is kept to another part, then the bargain becomes in fact two or more bargains, one of which is fulfilled and the others not; and then the covenants or agreements are independent or separable, and do not constitute a condition precedent.[3]

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[1] 2 Parsons on Contracts, 40, 41.

[2] Ritchie *v.* Atkinson, 10 East, 295. See ante, p. 245, n. 4.

[3] Per Ld. *Mansfield*, C. J., in Boone *v.* Eyre, 1 H. Bl. 273, note a. See also, Duke of St. Albans *v.* Shore, 1 H. Bl. 270; Campbell *v.* Jones, 6 T. R. 570; Fothergill *v.* Walton, 8 Taunt. 576; Glaholm *v.* Hays, 2 Man. & G. 257; Barruso *v.* Madan, 2 Johns. 145; Puller *v.* Staniforth, 11 East, 232; Storer *v.* Gordon, 3 M. & S. 308.

In the case supposed, the consideration for carrying the cargo, is the agreement to pay thirty dollars a ton; now this consideration is divisible by its very terms into thirty dollars per each ton; the promise to carry a full cargo, and the breach of it, may then be divided correspondingly; and the owner has broken all that part of his promise which relates to that part of the cargo which he did not carry, and has thereby released the shipper from paying him for that part of the cargo. But he has kept that part of his promise which relates to that part of the cargo which he has brought, and for so much, therefore, the shipper must keep his promise. So, if the owner promises that his ship shall be stanch and tight; and he carries the cargo, but the ship is neither stanch nor tight, this is not a separable promise in the sense in which a promise to carry a full cargo is; for a ship must be sea-worthy, or not sea-worthy, as a whole. But it is so far separable, that the effect of the breach of it does not necessarily extend to the whole cargo, and therefore may not to the compensation for carrying it. Therefore the owner would recover his freight, but be liable in damages for any consequences of the bad condition of his vessel, if goods were laden on board, but the freighter might refuse to put the goods on board.[1]

In regard to dependent and independent covenants, see Pordage *v.* Cole, 1 Saund. Wm's. Ed. 319; Roberts *v.* Brett, 18 C. B. 561, 36 Eng. L. & Eq. 358.

[1] Havelock *v.* Geddes, 10 East, 555. In this case the owner of a vessel covenanted that he would forthwith make her tight and strong, etc., for a voyage of twelve months, and keep her so. To an action of covenant on the charter-party for freight, the defendants pleaded the non-performance of this covenant in bar of the whole demand, and the plaintiff demurred. In giving the opinion of the court, Lord *Ellenborough* said: "The question upon the plea is, Whether the defendants are entitled to insist that the *forthwith making the ship tight, stanch*, etc., was a condition precedent. The defendants did not repudiate the ship, because she was not immediately made tight, stanch, etc., but took her into their service and employed her; and after having navigated her for several months, they say that, because this was a condition precedent, and was not performed, they are not liable to pay any thing. They do not pretend that the non-performance has damnified them to the extent of the payment they wish to evade; and, to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, stanch, etc., would be a breach of the condition, and a defence to the whole of the plaintiff's demand. We are clear, however, that the defendants, who took the ship into their service and employed her in an unimpaired state, have no right to insist that the *forthwith making her tight*, etc., was a condition precedent. Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is

So, if he promised to sail with the first convoy; but waited and afterwards sailed and arrived in safety; here, too, he would recover his freight.[1] And a covenant to sail with the first wind

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to be collected from the instrument in which the covenant is contained. . . . . And it would be an outrage to common sense to say, that it could have been the intention of these parties, that if the defendants took to this ship as a ship in their employ under the charter-party, they should be at liberty afterwards to insist that the making her complete in every particular, and that forthwith, without any delay, was a strict condition precedent on the part of the plaintiff. The cases cited are also decisive upon the point. . . . . Boone *v.* Eyre, 1 H. Bl. 273, in the notes, lays down a very sensible general rule, that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other: but where they go only to a part, and a breach may be paid for in damages: there, the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. Had the plaintiff's neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar; because the consideration for the defendants' covenant to pay the freight would then have failed *in toto;* but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only: the consideration has not *wholly* failed; and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right, under a counter action, to such damages as they can prove they have sustained from this neglect. For these reasons we are of opinion that this plea cannot be supported, and that the demurrer to it must be allowed." See also, Tarrabochia *v.* Hickie, 1 H. & N. 183, 38 Eng. L. & Eq. 339; Clipsham *v.* Vertue, 5 Q. B. 265, 272, per Ld. *Denman*, C. J.; Ollive *v.* Booker, 1 Exch. 416, 423, per *Parke*, B.; and Elliot *v.* Von Glehn, 13 Q. B. 632, 641, per *Erle*, J., to the point that a loading or use by the charterer would be considered as a waiver of the breach of the condition. In Dunbar *v.* Smeethwaite, Q. B. 1854, 24 Law T. 92, 29 Eng. L. & Eq. 189, in an action by a shipper of goods against a ship-owner for a breach of covenant that the ship should be sea-worthy at the commencement of the voyage, whereby he was prevented from insuring his goods, the defendant pleaded that before any loss, damage, or prejudice had arisen to the plaintiff the ship was made sea-worthy. Held, no plea. A contrary doctrine to Havelock *v.* Geddes has been asserted by the court of appeals in Maryland, that in an action by the shipper against the captain and consignee to recover money retained as freight, the plaintiff might resist the defendant's claim thereto by showing that the vessel was not sea-worthy at the commencement of the voyage, and recover accordingly. In this case the ship proceeded upon the voyage, but was compelled by adverse weather to put into a port, not that of destination, where she was condemned. Dickinson *v.* Haslet, 3 Har. & J. 345. But in Reed *v.* Dick, 8 Watts, 479, where the ship was lost by parting her cable, *Gibson*, C. J., decided that evidence that the sails were insufficient, would not make the carrier answerable for the injury to the goods on board. See also, Hart *v.* Allen, 2 Watts, 114; Collier *v.* Valentine, 11 Mo. 299; Forbes *v.* Rice, 2 Brev. 363.

[1] Davidson *v.* Gwynne, 12 East, 381. But when it is covenanted to load the vessel in time to sail with a convoy on a particular day, and the vessel arrives out in time to receive her cargo, but only a small portion of it is laden on the appointed day, the captain is not bound to wait, but may sail with the convoy, although the charterer offer to

is not a condition precedent.[1] Nor is a stipulation to load certain goods.[2] But if it is a part of the agreement that the ship shall be at, or sail from a certain place on or before a certain day there to receive a cargo, and she is not there on that day, this is a condition precedent; so far, at least, as to discharge the freighter from all obligation to load her, as the condition is not fulfilled; but if he loads her and she carries the cargo, then she earns her freight, subject as before, to damages for the breach of the provision as to time.[3]

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provide a full cargo in a few days. Thompson *v.* Inglis, 3 Camp. 428. See also, Shadforth *v.* Higgin, 3 Camp. 385.

[1] Constable *v.* Cloberie, Palmer, 397; Bornmann *v.* Tooke, 1 Camp. 377.

[2] Fothergill *v.* Walton, 8 Taunt. 576. See also, Stavers *v.* Curling, 3 Bing. N. C. 355; Deffell *v.* Brocklebank, 4 Price, 36; Galloway *v.* Jackson, 3 Scott, N. R. 753.

[3] In Glaholm *v.* Hays, 2 Man. & G. 257, by the memorandum of charter it was agreed that the vessel should proceed to Trieste, and there load a full cargo, and, being so loaded, should proceed to a port in the United Kingdom, upon payment of freight at a certain rate; that forty running days should be allowed the merchants for loading at Trieste, and for unloading at the port of discharge; and twelve days on demurrage, *the vessel to sail from England on or before the fourth of February next.* The vessel did not sail till the twenty-second of that month, being detained by contrary winds. The charterer refused to load any goods on board. Held, that the sailing on or before the fourth of February was a condition precedent. In Shadforth *v.* Higgin, 3 Camp. 385, the ship was to go to Jamaica, and the freighter undertook to provide a full cargo in time for the July convoy, provided she arrived out, and was ready by the twenty-fifth of June. Held, that her arrival was a condition precedent. In Croockewit *v.* Fletcher, 1 H. & N. 893, 40 Eng. L. & Eq. 415, the defendant pleaded to an action for breach of a charter-party by refusing to take the vessel, that the charter-party contained a stipulation that the vessel was to sail from Amsterdam to Liverpool on or before the fifteenth of March, and that she did not sail on or before that day. Replication, that the ship was prevented from sailing by dangers and accidents of the seas and by the act of God. On demurrer the replication was held bad. The charter-party contained this clause: "Restrictions of princes and rulers, the damages and accidents of the seas and navigation, the act of God, fire, pirates, and enemies, throughout the charter-party, always excepted." The court held, that, though this might exonerate the plaintiff in the event of the ship being prevented from sailing on the day named by any of the matters excepted, yet it did not affect the condition precedent upon the performance of which the defendant contracted to take and load the ship. And a replication that the defendants had repudiated the charter-party before the time of the sailing of the ship, was also held to be bad. See also, Bright *v.* Cowper, Brownl. 21; Tarrabochia *v.* Hickie, 1 H. & N. 183, 38 Eng. L. & Eq. 339. So, where it was agreed that a vessel should be launched and ready to receive cargo in all May, guaranteed to sail in all June, and that she should proceed to a certain port and load a full cargo, it was held, that the readiness to receive a cargo in all May, was a condition precedent to the plaintiff's right to recover for not loading a full cargo; and that a plea stating that the ship was not ready to receive a cargo in all May was good on general demurrer. Oliver *v.* Fielden, 4 Exch. 135. See also, cases ante, p. 130, note 2. In Ollive *v.* Booker, 1

At common law, this doctrine of dependent and independent covenants sometimes works great hardship, if not injustice. But, as applied to contracts relating to shipping, it is seldom laid down without a distinct and adequate reference to the intention of the parties, and the actual justice of the case. Indeed, it may almost be said, that there is a presumption of law, for there is certainly a strong disposition of the courts, against such a construction of a covenant or promise as would make it a condition precedent.[1] For it is obvious that the construction which disconnects the promises, and obliges each party to satisfy the other for so much of his promise as he has kept, saving, however, his right to indemnity for any promises which are broken, would, in the vast majority of cases, do justice, and complete justice, to both parties.

Whenever the courts are called on to construe a mercantile instrument, very great regard is always paid to mercantile usage. But it must always be understood, that, however powerful and important this may be in the interpretation of contracts, it is never suffered to control the express declarations of the parties. The whole influence of usage in the interpretation of contracts, is founded on the reasonable presumption that wherever men act in reference to a subject, in regard to which a distinct and established usage exists, so well known that they could not have been in ignorance of it, they may very fairly be presumed to have made their bargain with reference to that usage; or, in other words, to have made that usage a part of their bargain. But there is obviously no room for this presumption when the parties expressly declare that they had no reference to this usage; or when they make express provision for themselves,

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Exch. 416, a statement that a vessel was *at sea, having sailed three weeks previous or thereabouts,* was held to be a condition precedent. But in Elliot *v.* Von Glehn, 13 Q. B. 632, where the charter-party contained a representation that the vessel was then at Wyburgh, and it turned out that she had just sailed on her voyage from Wyburgh to Hull, it was held, that this was a mere representation and not a warranty. The defendant in this case had made some use of the vessel, by loading part of the cargo, and *Erle,* J., puts his decision partly on that ground. In another case, where it was covenanted that the ship should sail on or before February 12th, but the charter-party was not to take effect till the fifteenth of March, the time of sailing was held not to be a condition precedent. Hall *v.* Cazenove, 4 East, 477.

[1] See cases *supra.*

incompatible with this usage. And if their express provisions are one with the usage, then there is no need of calling on that, either to interpret or enforce the written agreement.[1]

SECTION VII.

OF THE DISSOLUTION OF A CHARTER-PARTY, OR OF ITS OBLIGATIONS.

All contracts may be dissolved by the parties who make them, if they agree in doing so.[2] But they must *agree* in this; for as soon as the contract is effectually and legally made, both parties are bound by it; and neither of them can, without the consent of the other, suspend or annul it, simply by giving notice of his intention to do so before the other party has done any thing whatever under the contract.[3]

The contract, however, may be dissolved, or its obligations annulled for the parties, against their will, and by causes extrinsic to them. Thus it is an universal rule, that if a contract, which is legal when made, becomes illegal before it is executed, it becomes thereby as wholly void as if it were illegal at the outset.

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[1] See 2 Parsons on Contracts, 48–59; Phillipps *v.* Briard, 1 H. & N. 21, 37 Eng. L. & Eq. 480; and ante, p. 156. But usage is only admitted in the case of contracts, and is, therefore, not admissible in cases of general average, for the right to contribution does not arise from contract, but depends upon a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned. Per *Curtis*, J., Sturgis *v.* Cary, 2 Curtis, C. C. 382.

[2] Thus Lord *Denman*, C. J., in Goss *v.* Nugent, 5 B. & Ad. 58, said: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement." See also, King *v.* Gillett, 7 M. & W. 55; Cummings *v.* Arnold, 3 Met. 486; Buel *v.* Miller, 4 N. H. 196; Howard *v.* Macondray, Sup. Jud. Ct., Mass., Nov. T. 1856. But if the contract be under seal, it requires by the rules of the common law an instrument of as high a nature to terminate it.

[3] See Tindal *v.* Taylor, 4 Ellis & B. 219, 28 Eng. L. & Eq. 210, and cases cited ante, p. 159, note 2.

And for the same reason, namely, that the law cannot be called on to enforce a violation of itself.[1] Thus, if a war be declared by the country to which a ship belongs against one to which it was about to carry a cargo, this war makes all commercial intercourse illegal, and thereby annuls all obligation of carrying that cargo.[2] Or if the proper authority of the same country lays an embargo, or passes an act of non-intercourse, or of especial prohibition which extends to that ship and cargo; here the contract becomes illegal. But war annuls such a contract, while an embargo,[3] or

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[1] See 2 Parsons on Contracts, 186.

[2] Ord. de la Marine, liv. 3, tit. 1, Charte-Partie, art. 7; Code de Com. art. 276; Barker *v.* Hodgson, 3 M. & S. 267, per Lord *Ellenborough*, C. J.; Brown *v.* Delano, 12 Mass. 370; Palmer *v.* Lorillard, 16 Johns. 348; Avery *v.* Bowden, 5 Ellis & B. 714, 33 Eng. L. & Eq. 133, 137, per Lord *Campbell*, C. J.; s. c. 6 Ellis & B. 953, 38 Eng. L. & Eq. 130; Barrick *v.* Buba, 2 C. B. N. S. 563. See also, Esposito *v.* Bowden, 4 Ellis & B. 963, 30 Eng. L. & Eq. 336; Reid *v.* Hoskins, 4 Ellis & B. 979, 30 Eng. L. & Eq. 406. See also, same case, 5 Ellis & B. 729, 34 Eng. L. & Eq. 51, affirmed 6 Ellis & B. 953, 38 Eng. L. & Eq. 130. In Clemontson *v.* Blessig, 11 Exch. 135, 32 Eng. L. & Eq. 544, war had been declared by England against Russia, but there was an order of council passed that Russian merchant vessels, in any ports or places in her majesty's dominions should be allowed six weeks for loading their cargoes and departing; and that such Russian merchant vessels, if met at sea by any of her majesty's ships, should be permitted to continue their voyage, if, upon examination of their papers, it should appear that their cargoes were taken on board before the expiration of the above period. An order had been sent to the plaintiff in England to ship goods to the defendant in Russia, and the defendant promised in payment of the goods to accept the plaintiff's draft for the price. In an action for not accepting, the defendant pleaded, that, before the goods were shipped, war was declared, which rendered the contract illegal. The plaintiff filed a replication setting forth the order of council, and averred that the goods were shipped before the expiration of the six weeks. On demurrer the court held, that the contract was not dissolved by the war.

[3] In Odlin *v.* Ins. Co. of Penn. 2 Wash. C. C. 312, 317, *Washington*, J., laid down the law as follows: "It is stated, on the part of the underwriters, as a general rule, that where a contract is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered at an end. This, as a general rule, will not be controverted. But there is an obvious distinction between a law which renders the performance *unlawful altogether*, and one which merely *suspends the performance*, without condemning the subject of the contract. If the trade between this country and any other be wholly interdicted, or partially so, in relation to particular articles; or if, after the contract to carry goods from this to that other country, war should break out between them, *the subject-matter* of the contract becomes unlawful; the prohibition acts directly upon it, and forbids the performance. It is no answer, that the prohibition may, upon a change of circumstances, be removed; the prohibition defeats the contract, and releases the parties from all its obligations. But, in the case of a temporary restraint upon the performance of the contract, the subject-matter of it is not declared to be unlawful, the trade itself is not condemned, — the legality of it is rather admitted, but it is not permitted to be

prohibition,[1] may only suspend it. If the measure is one which may be regarded as intended for a brief period only, and if the voyage may be delayed without material damage, and then resumed and completed with no other effect than that of temporary interruption, then we should say that the contract was not dissolved; that the ship, on the one hand, was bound to wait with her cargo on board for the opportunity of carrying it to her port of destination; and on the other, that the ship had the right of insisting upon retaining the cargo for the purpose of thus earning the freight.[2]

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performed for the present. Here the rule applies, that, if a law forbids performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo, for example, the ship-owner is disabled from commencing his voyage at the specified time, but he is bound to go when the prohibition is removed." See also, Hadley *v.* Clarke, 8 T. R. 259, in which case an embargo of two years was held merely to suspend the contract. In the head note to Bork *v.* Norton, 2 McLean, 422, it is stated that a *permanent* embargo would excuse the master from the performance of his contract. In the first place no such point was decided in the case; and, secondly, there is not even a *dictum* to that effect. The court cited Hadley *v.* Clarke, and expressed a doubt whether the principle, there laid down, would apply to a contract on the lakes, but expressly said that they did not intend to decide the point. However this may be, it is very clear that an embargo, although of indefinite duration, merely suspends the performance of the contract. M'Bride *v.* Mar. Ins. Co. 5 Johns. 209, 308; Baylies *v.* Fettyplace, 7 Mass. 325. It was held, in Touteng *v.* Hubbard, 3 B. & P. 291, that where a contract of affreightment by charter-party was entered into between an English merchant, and the captain of a Swedish ship, it would be terminated by an embargo laid by the government of Great Britain on Swedish vessels. The general principle of Hadley *v.* Clarke was fully recognized, but it was held that the embargo was an act of hostility by the government of Great Britain against Sweden, and that a British subject should not be compelled to indemnify a Swede for the consequences arising therefrom, because this would defeat the objects of the embargo. See also, Conway *v.* Gray, 10 East, 536; Conway *v.* Forbes, id. 539; Maury *v.* Shedden, id. 540. *Kent*, C. J., in M'Bride *v.* Mar. Ins. Co. *ut sup.* says the reasonings by which these cases are supported appears to be drawn from political considerations, rather than from principles of law.

[1] See Richardson *v.* Maine Ins. Co. 6 Mass. 102, 111, where the law is stated by *Parsons*, C. J., as follows: "When the sovereign of the country, to which the ship belongs, shall prohibit his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country, or be made by an express ordinance for any cause at the will of the sovereign, a voyage to that country for the purpose of trade is illicit." See also, Palmer *v.* Lorillard, 16 Johns. 348, 356. There is no difference in principle between a complete interdiction of commerce, which prevents the entry of the vessel, or a partial one in relation to the merchandise on board, which prevents it being landed. Patron *v.* Silva, 1 La. 275.

[2] See cases *supra*. As an embargo merely suspends the contract, so a lowness of water, which prevents a vessel reaching the port, has the same operation. Schilizzi *v.*

If the continuance of this restraint and prohibition be not only uncertain, but, as far as can be judged, likely to continue for a long period, so that it would be unreasonable to detain the ship or the cargo in her to wait this distant opportunity; or if the goods are perishable, and cannot probably survive even a short delay without destruction or great diminution of their values,— we should say the contract was now, not suspended, but annulled.[1]

So, if there be a blockade of the port in which the vessel is lying, and from which she is to proceed on the proposed voyage, this would generally only suspend the obligations of the contract,[2] but might annul them, if the facts gave rise to reasons

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Derry, 4 Ellis & B. 873, 30 Eng. L. & Eq. 312. This was an action by the charterers of a vessel against the owners for a breach of contract. By the charter-party the defendants agreed that the ship should proceed to Galatz, or as near thereto as she could safely get, and there load a cargo, perils of the seas, rivers, and navigation excepted. Galatz is a port of Moldavia, on the River Danube, ninety-five miles from the Sulina mouth. On the 5th of November the ship arrived off the mouth of the Danube. At that time, and until the 7th of January following, the water was so low on the bar at the mouth of the river that the ship was unable to cross. On the 11th of December she was obliged, by stress of weather, to go to Odessa, as the nearest safe port, where she afterwards took in a cargo and sailed for England. On and after January 7th there was sufficient water on the bar for the ship to have crossed and to have gone to Galatz, and there shipped a cargo. Held, that under these circumstances the defendants were not justified in putting an end to the contract. The reasons upon which this case was decided are fully set forth in the opinion of Lord *Campbell*, C. J. He said: "With regard to the terms of the charter-party, 'so near the port of loading as the ship could safely get,' the meaning must be that she should get within the ambit of the port, though she may not be able to enter it. It might as well be said, that if the ship had been stopped in the Dardanelles she had got as near Galatz as she safely could. On this issue, therefore, the plaintiffs must have judgment. Then, the next issue is founded on the exception of the dangers of the seas, rivers, and navigation. But this case clearly does not fall within that exception, for although we must reasonably suppose that up to the 7th of January the ship could not have crossed the bar, yet this was only a temporary impediment, and after that date she might well have crossed, and reached the port of destination. If so, how or when was the contract dissolved? . . . . It was, no doubt, not safe for the ship to keep on and off at the mouth of the Danube, but she might have gone to Odessa or Constantinople, and there have waited until the bar was passable."

[1] See The Isabella Jacobina, 4 Rob. Adm. 77.

[2] Stoughton *v.* Rappalo, 3 S. & R. 559. In this case certain barrels of flour had been shipped on a voyage from Philadelphia to Havana. The same day that the bills of lading were signed and the clearances at the custom-house obtained, a blockade of the Delaware was instituted by the British. The master of the vessel refused to deliver up the flour unless the owner would pay one half freight. It was in proof that the cargo would be very much deteriorated in value, if detained on board till the expi-

such as applied in the case above supposed of embargo or prohibition. But the contract is not determined by the unlawful seizure of the vessel by a stranger.[1]

If a blockade be formally notified to a nation, all the citizens thereof must take notice of it at their peril.[2] No ship is bound to enter a port which is actually blockaded.[3] If the blockade be

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ration of the blockade, but the court expressly refused to decide the case on this ground, and to say whether or not, the contract was dissolved. The decision proceeded entirely on the assumption that, as the vessel had not broken ground, the master had acquired no lien on the goods for the freight. But this principle is incorrect, for, we have already seen that though prior to breaking ground the master has no lien, strictly speaking, on the goods for the freight, yet he has a right, from the moment they are laden on board, to retain them till the lien is acquired. See ante, p. 128, note 1. We therefore are strongly of the opinion that this case is of no authority in contravention to what we consider now to be the well-established rule of law, namely, that the contract is merely suspended. See the learned and elaborate opinion of Chancellor *Kent*, in the Court of Errors, in the case of Palmer *v.* Lorillard, 16 Johns. 348, overruling the decision of the Supreme Court, in the same case, 15 Johns. 14. See also, Ogden *v.* Barker, 18 Johns. 87; Richardson *v.* Maine F. & M. Ins. Co. 6 Mass. 102. But if the port of destination is blockaded the contract is thereby dissolved. Scott *v.* Libby, 2 Johns. 336; The Tutela, 6 Rob. Adm. 177.

[1] Muggridge *v.* Eveleth, 9 Met. 233.

[2] The Neptunus, 2 Rob. Adm. 110; The Bark Coosa, 1 Newb. Adm. 393. This rule has been relaxed to some extent in cases of insurance, and it has been held to be a question of fact for the jury to decide whether the parties knew of the blockade. Harratt *v.* Wise, 9 B. & C. 712. See also, Naylor *v.* Taylor, id. 718; Medeiros *v.* Hill, 8 Bing. 231. There are two kinds of blockade known to the law, a blockade *de facto*, and a blockade by notification. In either case there must be an actual blockade, and notice brought home to the party, or facts shown, from which knowledge of the blockade may be presumed. In the case of a blockade by notification, it will be presumed to continue till public notification of its discontinuance is shown, and the burden of proof is on the captured vessel to overcome this presumption. The Neptunus, 1 Rob. Adm. 170. Though public notification of the existence of a blockade is customary, still private notification is sufficient. The Mercurius, 1 Rob. Adm. 80. It is enough if merely knowledge of the blockade be shown. The Columbia, 1 Rob. Adm. 154, 156. Where an enemy's port was declared to be blockaded, and notification thereof was duly made, but, about the same time news was received that the blockading squadron had been driven off by a superior force, it was held that the act of sailing for the port under such circumstances would not amount to a breach of the blockade, but that notice of its being resumed should have been given. The Trihetен, 6 Rob. Adm. 65.

[3] Thus Sir *William Scott*, in the case of The Columbia, 1 Rob. Adm. 154, said: "It is unnecessary for me to observe, that there is no rule of the law of nations more established than this; that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory opinions that have been advanced on the law of nations, this principle has never been disputed: it is to be found in all books of law, and in all treaties; every man knows it; the subjects of all States know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge."

only in intention, or by decree, it is only what is called a paper blockade; and it is now settled that it is no breach of the law of nations to enter the port; and a ship might insist upon its right to go there, and a shipper might insist that the ship should carry his cargo thither.[1] But as a ship is bound not to break an actual blockade, and if it does so, is forfeited by the law of nations, so it is not bound to incur any actual and substantial danger, in attempting to do so, if the port be imperfectly blockaded.[2] Nor has it any right to incur such danger, and jeopardize the cargo, for the purpose of earning its freight. If a vessel is warned off and afterwards returns, this is *primâ facie* evidence of a criminal intention to enter, but this may be rebutted by showing that a stringent necessity was the cause of the return.[3]

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[1] Grotius, de Jure Bel. ac Pac. lib. iii. cap. 1, § 5, note 3. To justify a condemnation for breach of blockade three things must be proved: "1st. The existence of an actual blockade; 2dly. The knowledge of the party; and, 3dly. Some act of violation, either by going in or by coming out with a cargo laden after the commencement of the blockade." Per Sir *William Scott*, in the case of The Betsey, 1 Rob. Adm. 93. See also, Schacht *v.* Otter, 9 Moore, P. C. 150, 33 Eng. L. & Eq. 28; The Brig Nayade, 1 Newb. Adm. 366; The Bark Coosa, 1 Newb. Adm. 393. This rule, according to a very able writer on international law, has been confirmed by numerous modern treaties, and especially by the convention of 1801, between Great Britain and Russia, which was intended as a final adjustment of the disputed points of maritime law. The third article, section fourth, of this convention declares: "That in order to determine what characterizes a blockaded port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering." Wheaton's Elem. of International Law, 577. The blockade must be maintained by a force sufficient to prevent vessels going out and coming in. The Nancy, 1 Act. 57. In Naylor *v.* Taylor, Moody & M. 205, the blockading squadron was a hundred miles distant from the port. It was held that it might lie at any distance convenient for shutting up the port blockaded, provided it thereby obstructed no other. When this case came up on appeal, 9 B. & C. 718, the point does not appear to have been noticed. See also, The Arthur, 1 Dods. 423; The Stert, 4 Rob. Adm. 65; The Frau Ilsabe, id. 63; The Luna, Edw. Adm. 190; The Juffrow Maria Schroeder, 3 Rob. Adm. 147.

[2] Nor has the vessel a right to enter if the blockading squadron is driven off by accident, as by a storm, or a change of wind. The Neptunus, 1 Rob. Adm. 170, 171; The Frederick Molke, id. 86; The Columbia, id. 154, 156; The Hoffnung, 6 Rob. Adm. 112, 117; The Juffrow Maria Schroeder, 3 Rob. Adm. 147. The blockade is not terminated by the vessels of the squadron being absent while engaged in chasing suspicious vessels. The Eagle, 1 Act. 65. But this chase must not be pursued to such a distance as to interfere with the maintaining of the blockade. La Melanie, 2 Dods. 122, 130.

[3] The Brig Nayade, 1 Newb. Adm. 366. But the excuse of want of water, which was that made in this case, or the want of provisions, will always be received with great suspicion, and it has been held, that the vessel should, in such a case, seek some other than the blockaded port. The Hurtige Hane, 2 Rob. Adm. 124; The Fortuna, 5 Rob.

And it is no breach of law for a vessel to sail for a port which is known to be blockaded, with the hope of finding the blockade terminated, or with the purpose of waiting, at sea or in a neighboring port, until the blockade shall terminate.[1] A ship, there-

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Adm. 27. But this rule was held not to apply where there were no open ports near that blockaded. The Brig Nayade, *supra*.

[1] The Shepherdess, 5 Rob. Adm. 262; The Betsey, 1 Rob. Adm. 332; The Dispatch, 1 Act. 163; The Little William, 1 Act. 141; Naylor *v.* Taylor, 9 B. & C. 718; Medeiros *v.* Hill, 8 Bing. 231. The vessel must not, however, proceed immediately to the blockaded port, but the proper course is to stop at some port of the blockading power, for information. See cases cited above. In the case of The Betsey, however, as the property was not disputed, and nothing appeared to affect the owners with a fraudulent intention, the vessel was restored, though information was to have been obtained at the blockading port. Where the blockading force had received orders not to capture a vessel, unless previously warned off, it was held that the master might sail direct for the port, and need not make inquiries elsewhere. Maryland Ins. Co. *v.* Woods, 6 Cranch, 29. See, however, The Columbia, 1 Rob. Adm. 154. The four cases first above cited are those of American ships seeking a blockaded port in Europe, and for this reason the established rule, that sailing to a blockaded port constituted a breach of the blockade, was relaxed in their favor. Thus Sir *William Scott*, in the case of The Betsey, said: "I certainly cannot admit that Americans are to be exempted from the common effect of a notification of a blockade existing in Europe. But I think it is not unfair to say, that lying at such a distance where they cannot have constant information of the state of the blockade whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them if they were bound rigidly by the rule, which justly obtains in Europe, that the blockade must be conceived to exist, till the revocation of it is actually notified. For, if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued." It may, however, be doubted whether, in case of another war, American vessels would be treated with less severity than vessels of other countries, on account of the facilities of communication afforded by steam navigation, which in those days was unknown. And the ocean telegraph, if it continues to exist, will entirely do away with the distinction existing between American vessels and those of any other country; except so far as the same is regulated by treaties.

When a European port is blockaded, European vessels are not allowed to sail to that port with the intention of not entering if it is not blockaded. The Spes, and The Irene, 5 Rob. Adm. 76; The Posten, 1 Rob. Adm. 335, note. By the treaty of 1794, between Great Britain and the United States, provision was made for the inconveniences resulting from the distance between the two countries. Thus the eighteenth article declares that, "Whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested; it is agreed that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper." See Fitzsimmons *v.* Newport Ins. Co. 4 Cranch, 185.

fore, *may* do this. But we should doubt whether a ship would have a right to insist upon carrying a cargo to a blockaded port for such a purpose, or whether a shipper could insist that his cargo should be carried, unless the facts were such as showed clearly that the blockade would continue only for a short time, and that the sailing on such a voyage for such a purpose was clearly reasonable and prudent.

These remarks apply to the case where the blockade becomes known after the contract of affreightment is made. If the parties, knowing the blockade, choose to agree that the ship shall go to the port, or near it, and wait for the opportunity of going in, they may hold each other to the contract, for it is not illegal in itself.[1] And although no ship is bound to enter a port actually blockaded, but is indeed bound not to enter it, yet if war breaks out between other countries, which renders the prosecution of the voyage more or less dangerous, this danger, in general, neither dissolves nor suspends the contract.[2] Perhaps it would have that effect if it became imminent and extreme, so as to make the execution of the contract involve the certain, or even the probable, loss of ship and cargo.

If a ship and cargo be captured, and afterwards restored to the master and owner, such capture merely suspends the contract; unless the length of the detention, or other circumstances

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[1] Thus *Tindal*, C. J., in Medeiros *v.* Hill, 8 Bing. 231, said: "The contracting parties must be taken to have entered into the charter-party with an equal knowledge of its existence; no difficulty, therefore, attending the performance of the contract can be set up as an excuse for its non-performance. In that case the rule of law laid down in Paradine *v.* Jane, Aleyn, 26, applies, namely, 'That when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.'" See also, Naylor *v.* Taylor, 9 B. & C. 718.

[2] Avery *v.* Bowden, 5 Ellis & B. 714, 33 Eng. L. & Eq. 133. In this case a charter-party was entered into between two British subjects, by which the ship was to proceed to Constantinople, and thence to Odessa, where she was to take in a cargo at a stipulated rate of freight, and bring the same home. "In case of war having commenced previous to and continuing on the ship's arrival at Constantinople," the charterer was to load the ship at that port at a reduced rate of freight. It was held that this clause meant such a war as would render the voyage of an English ship from Constantinople to Odessa unlawful, and which, without the clause, would have dissolved the contract; and that the plaintiff was not entitled therefore to a cargo at Constantinople, though a war between Turkey and Russia had broken out previous to, and continued after the arrival of the vessel at that port. Affirmed, 6 Ellis & B. 953, 38 Eng. L. & Eq. 130.

connected with it, caused the voyage to be broken up without the fault of either party; for this would be considered an actual dissolution of the contract.[1] The charter-party generally provides that the owners will not be responsible for a loss arising from the perils of the seas, and it has been held that they would not be liable for such a loss, were the clause omitted.[2] And the plaintiff is not obliged to negative the exception in his declaration, but the defendant, if he wishes to avail himself of it, must plead it.[3] It is sometimes provided that the

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[1] It seems to have been held by the courts of admiralty in England, that the capture of the vessel and the unlivery of the cargo, terminate the contract of affreightment. The Racehorse, 3 Rob. Adm. 101; The Martha, 3 Rob. Adm. 106, note; The Hoffnung, 6 Rob. Adm. 231. See also, The Louisa, 1 Dods. 317; The Wilelmina Eleonora, 3 Rob. Adm. 234. See however, the judgment of the court in Beale *v.* Thompson, 3 B. & P. 405, 428; Bergstrom *v.* Mills, 3 Esp. 36; Moorsom *v.* Greaves, 2 Camp. 627. In The Nathaniel Hooper, 3 Sumner, 542, 556, Mr. Justice *Story* made an elaborate review of the cases decided in the English admiralty, and held that they could not be considered as authority here. He said: "In the first place it is an inadmissible assumption, that the capture dissolved the contract of affreightment. At most, it only suspended it; and it reattached upon the recapture. Recapture confers a title to salvage only, and restores, and does not extinguish, the rights of neutrals, and, *a fortiori*, not the rights of fellow subjects upon the admitted principles of the British laws." And again, p. 559, "In my humble judgment, it would be a most mischievous doctrine to the great interests of commerce and navigation, that a mere unlivery of cargo by superior force, or by the order of a court of prize, should operate to dissolve a contract made between mere neutrals. How is it in relation to other cases, arising in the common course of navigation? Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unlivered, in order to make the repairs, or to insure its safety, or ascertain and repair the damage done to it; would such an unlivery dissolve the contract for the voyage? Certainly not." See also, Spafford *v.* Dodge, 14 Mass. 66.

[2] The Casco, Daveis, 184. In this case, *Ware*, J., said: "It is usual in charter-parties of affreightment, as well as in bills of lading, to insert a clause specially exempting the master and owners from losses occasioned by the dangers of the seas. This instrument contains no such exception, but this as was justly contended in the argument for the respondents, is an exception, which the law itself silently supplies without its being formally expressed. It is a general rule of law, founded upon the plainest and most obvious principles of natural justice, that no man shall be held responsible for fortuitous events and accidents of major force, such as human sagacity cannot foresee, nor human prudence provide against, unless he expressly agrees to take these risks upon himself." It may, however, be doubted whether the carrier by omitting to insert the exception in his contract, did not thereby assume a risk similar to that of an insurer. See ante, p. 178, note. But in Ames *v.* Belden, 17 Barb. 513, the charterer stipulated to return the vessel in as good a condition as she was then in, ordinary use and tear excepted. It was held that if the vessel was lost by an act of God, or by a peril of the sea, he was not liable.

[3] Wheeler *v.* Bavidge, 9 Exch. 668, 25 Eng. L. & Eq. 541.

voyage shall terminate on the vessel's entering a certain port, and what constitutes such entry depends in a great measure on the intention of the parties, and is a question for the jury in every case.[1]

Many questions have arisen in respect to stipulations in charter-parties concerning the "sailing" of the vessel, or her "departure" from a certain place. We shall treat of the meaning of these phrases in the second volume, as they most frequently occur in contracts of insurance. Where a risk is excepted "during the voyage," it would seem that the exception is effective only while the ship is out of port, and is not in force during the loading.[2] If it is stipulated that a vessel shall proceed to a

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[1] In Goddard *v.* Bulow, 1 Nott & McC. 45, the charter-party stipulated that the captain was to proceed directly on his voyage to the port of Lisbon, but if Lisbon was in possession of the French, then the vessel was to proceed to Fayal and there discharge her cargo, and no additional freight was to be paid, but if the freighters ordered the vessel to Fayal when she could discharge her cargo at Lisbon, then additional freight was to be paid. At the bottom of the charter-party was the following note: "It is clearly understood and agreed to by the parties that if the said ship *enters* the port of Lisbon, she shall there discharge her cargo and the voyage end and determine." Held that the supercargo was justified in going to Lisbon to obtain the information necessary to enable him to exercise his discretion, and that it was a question for the jury whether he entered for the purpose of terminating the voyage or discharging the cargo, or whether it was for the purpose of information.

[2] In Crow *v.* Falk, 8 Q. B. 467, it was agreed by charter-party that a ship then at Liverpool should be got ready, and should receive and load from the charterer's agents a full cargo, and being so loaded should proceed to Stettin, and deliver the same and so end the voyage, restraints of princes, etc., during the said voyage always mutually excepted. Held, that the exception as to restraints of princes, etc., was applicable only after the ship quitted Liverpool. But in the subsequent case of Bruce *v.* Nicolopulo, 11 Exch. 129, 32 Eng. L. & Eq. 609, the charter-party provided that the vessel after discharging her outward cargo for the owner's benefit, was to proceed to Galatz, or Ibraila, as ordered at Constantinople, or Sulina, by the charterer's agents, and there load a cargo of corn, and therewith proceed homewards and discharge at a port in the United Kingdom, and so end the voyage, restraints of princes and rulers, the dangers of the seas, etc., during the said voyage excepted. Held that the voyage commenced from the period of the discharge of the outward cargo, and a plea that the vessel while at Ibraila was prevented from loading by the ruler of the country wherein Ibraila is situated was held good. *Pollock*, C. B., said: "If the facts in Crow *v.* Falk be correctly stated in the report, I cannot subscribe to that case." *Martin*, B., "Assuming the case of Crow *v.* Falk to be good law, I am of opinion that this case is distinguishable from it. Here the vessel, after discharging her outward cargo, was to proceed to Galatz or Ibraila, as ordered by the charterer's agents, and I am of opinion that the particular voyage commenced at that time, and, consequently, that the exception as to the restraint of princes and rulers existed from the time of the discharge of the outward-bound cargo, until the completion of the voyage at a port in the United Kingdom." But see Hurst *v.* Usborne, 18 C. B. 144, 36 Eng. L. &. Eq. 299, 303.

place "with all convenient speed," this means that she shall proceed there in a reasonable time, and evidence that she did not arrive till after the expiration of the season for exporting the articles she was to have carried, is inadmissible to show whether she arrived in a reasonable time.[1] Where goods were shipped to any port or ports on the continent with permission to take them to England in case all the ports on the continent should be *shut*, it was held that the word *shut* meant an occlusion by the municipal authorities of the country, and that the jury could not determine whether or not it was expedient to land the goods on the continent.[2]

If the charter-party contains a clause whereby the goods and vessel are respectively bound in a penal sum, it has been held that such penalty is merely in addition to any other remedy provided for in the covenants, and not a limitation of the liability of the parties.[3]

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[1] Hurst *v.* Usborne, 18 C. B. 144, 36 Eng. L. & Eq. 299, 303.

[2] Mactier *v.* Wirgman, 4 Harris & J. 568.

[3] Knight *v.* Cargo of Bark Salem, U. S. D. C., Mass., 20 Law Reporter, 669, in accordance with the common law doctrine as laid down in Harrison *v.* Wright, 13 East, 343. But this point was decided the other way in an early case. Campbell *v.* Ship Alknomac, Bee, Adm. 124, 127.

CHAPTER IX.

ON GENERAL AVERAGE.

SECTION I.

OF THE ORIGIN AND FOUNDATION OF THE LAW OF GENERAL AVERAGE.

General average, particular average, and partial loss, are all of them phrases in common use, and their meanings should be carefully discriminated. A general average loss is one which is made to fall upon all the interests at risk and saved by being averaged upon all. Partial loss, is a loss of a part which does not give rise to any claim for contribution, but rests where it falls. Particular average is used generally, as synonymous with partial loss, and instead of that phrase. But this, we think, is not quite accurate. First, because a partial loss is precisely a loss which gives rise to no average at all, and the phrase should not be used, because there is no element of an average in a partial loss.[1] And secondly, because there may be such a thing as a

[1] Abbott, in his treatise on Shipping, p. 473, speaks of particular average as a very incorrect expression, used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever. This use of the expression is defended in Maude & Pollock on Shipping, p. 189, on the ground that *average* means merely *damage*, and therefore particular average means the same as partial damage, or loss. See also, Nimick *v.* Holmes, 25 Penn. State, 366, per *Lowrie*, J. We do not propose to go into a discussion of the primitive meaning, or etymology of the word, but merely say that it is impossible to ascertain it with any degree of certainty. See Emerig. on Ins. ch. XII. sect. xxxix. § 4, Meredith's ed. 465. The curious reader will find the question discussed in Pardessus Cours de Droit Com. part. iii. tit. iv. ch. 4; Ord. de la Mar. 577; Pothier on Maritime Contracts, by Cushing, 59; Loccenius,

particular average. For this would occur, when there is a peril involving certain interests or property, but not all, and a part of the property is sacrificed to save the rest that is in peril, and all of what is saved of the imperilled part of the property, should contribute by way of average. Such a case as this is certainly not improbable, and although it might be called a case of general average limited to the things in peril, the term particular average might be applied to it far more correctly than to a partial loss.[1]

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de Jure Maritimo, lib. II. ch. viii. § 1; Molloy, Book II. ch. vi. § 4; Millar on Ins. 334; Weskett on Ins. 25; 2 Marshall on Ins. 334; Stevens & Benecke on Average, by Phillips, pp. 56, 96. But, admitting that *average* means *damage*, we are unable to see why particular average and partial loss should be synonymous terms, any more than *general average* and *total loss*.

[1] See Whitteridge *v.* Norris, 6 Mass. 125. In this case a vessel, while proceeding up the river Hoogly, struck the ground, and being expected to bilge, the boats were hoisted out and some kegs of dollars were put into the long boat, together with some provisions and clothing. The boat being overladen it was necessary to throw six of the kegs overboard, among which was one belonging to the plaintiff. The boat and the rest of the kegs reached the shore in safety. The vessel was also saved with the remaining cargo. The plaintiff sought to charge the ship and cargo generally for a general average contribution, or, i this should not be allowed, then the articles saved in the long boat. The court held that the ship and cargo were not liable, because the goods were not put in the boats with the intention of saving the ship or the remaining cargo. In regard to the other point the court said: "As to the few articles of the cargo which were brought to the shore in the long boat, these were preserved at the expense of the plaintiff in some measure. But it is to be considered, that the goods saved in the long boat, and the goods lost in the jettison from it, were thus exposed together, in consequence of a previous peril, and for the purpose of saving what could be saved, without any concert or mutual design of the parties interested. There was no engagement, or common benefit intended, from which the rights and duties of the respective owners can be inferred. The passengers, as the people in the long boat may be called, were justified in lightening the boat, upon which they depended for the safety of their lives. (Mouse's case, 12 Coke, 63.) The goods thrown out, for every purpose of this inquiry, and as to the rights and duties of the particular owners or freighters, were in no other situation than that of the goods left in the ship. If the ship had perished, the event had been precisely the same. If the goods lost in the jettison from the long boat had been left in the ship, the danger from overloading the boat would not have been incurred; and the eventful safety of the ship, and the loss of the plaintiff's keg of dollars, in attempting to save them, without any regard to the safety of the ship, or of the other effects taken together into the long boat, afford no case of contribution or average." This reasoning does not seem to us to be altogether satisfactory. If the suggestion, thrown out on the authority of Mouse's case, be followed, there can be no such thing as general average. In regard to the other branch of the argument that the boat would not have been overloaded if the goods, which were jettisoned, had not been put on board, we have only to say, that it was not shown which goods were put in the boat first, and consequently the goods saved might have

The law of general average rests upon reasons which are so obvious, and so certainly just, that it is not surprising to find that it is older than any other law or rule now in force. We have already seen that it was found in the code of Rhodes; and is, indeed, probably, the only part of that code which has been certainly preserved.[1] And it owes this distinction to the fact that it was incorporated into the Roman civil law.[2] We have seen that by this provision, property jettisoned to save other property, was contributed for by the property saved. This is the foundation of the law of general average; and all beside this consists only of the rules which have been devised to carry this principle into its proper effect, in the great variety of cases, and through the many consequences, which belong to its application.

The justice of the rule is perfectly obvious at first sight. Indeed, any attempt to illustrate the justice of requiring that property which has been saved by the sacrifice of other property for that purpose, should compensate the holder of the property sacrificed, would only obscure what must be perfectly manifest at the first intuition. But all the reasons for the rule are not so obvious. There are many and of much weight, drawn from expediency, in addition to those which may be said to have a moral origin and aspect.

Let us suppose a ship laboring in a tempest and threatened with wreck. It is necessary to lighten her, and if that be done there is a probability that she will escape with the remainder of her cargo. The question would arise at once, whose property shall be sacrificed? Most probably, in such an emergency, the

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been the cause of the loss equally with the others, and also that the danger did not occur till the boat was nearing the shore. But for the high authority of the court which decided this case, we should be strongly inclined to say that the goods saved should have contributed for those lost, as the latter were jettisoned for their benefit, and were thereby the means of their being saved. And, had this been the decision, the case would have afforded a good example of the distinction between general and particular average.

[1] See ante, p. 6.

[2] Dig. 14, 2. Probably the earliest English case on the subject is Hicks *v.* Palington, 32 Eliz., F. Moore, 297. It must have been introduced into English jurisprudence at a very early date, for in 1285, Edward I. sent to the Cinque Ports letters patent declaring what goods were liable to contribution. See 1 Rymer Fœdera, 3d ed. p. 240.

goods which could be most easily reached, would be thrown over; or those which, having the most weight in the least bulk, would most effectually and speedily relieve the ship. This might always be expected, and might perhaps become the rule. And the inconvenience and embarrassment which would ensue are obvious. At the lading of the ship, the different shippers would be contending each to place his goods as far as possible from this mischance. And it might be that the master or officers would be paid by one or another to save his property in case of peril; or the master, whether innocent or not, might often be suspected of unfair selection. To prevent every thing of this kind effectually, the rule of general average contribution is always applied; and also to equalize the loss and spread it over a wide surface, which is another result that the law-merchant desires. The effect of this rule is, that whatever is sacrificed, becomes by being sacrificed, the property, and the loss, equally, of all who are benefited by it. And in order that this rule should have this effect, it is obvious that it must be so applied, that if A's goods are jettisoned and B's saved, A shall lose as much and save as much, and B shall lose as much and save as much, as if B's goods had been jettisoned and A's saved.

It follows from this that the owner of the goods sacrificed is not repaid their full value, for then he would be in a better position than they who pay him. But he must be paid so much only as will leave his proportion of loss the same as theirs.[1] Thus if a ship be worth $20,000, the freight, $10,000, the cargo, $70,000, of which A owns $30,000, B $20,000, and C $20,000. There is a jettison of A's goods to the amount of $10,000, which saves all the rest. To ascertain the amount due to him from the other parties, first, the whole property at risk and saved by the jettison is added together, and in the above case it amounts to $100,000. The amount lost is ten per cent. of this. Therefore everybody must lose ten per cent. The ship pays A $2,000, the freight pays him $1,000, B pays him $2,000, C pays him $2,000; and these payments amount to $7,000, and he thus remains a loser of $3,000, which is ten

[1] Simonds *v.* White, 2 B. & C. 805; Lee *v.* Grinnell, 5 Duer, 400, 431; Abbott on Shipping, 506; Pothier on Maritime Contracts, n. 123, Cushing's ed. p. 70.

per cent. on his property, or the same percentage which the others lose by their contributions to him. A case so simple as this seldom occurs in practice; but all cases are settled upon this principle, for the obvious reason that no other would divide the whole loss ratably among all those who should sustain it.

From what we have already said, it may be seen that there are three essentials, without all of which there can be no claim for general average. First, the sacrifice must be voluntary; second, it must be necessary; third, it must be successful. Or, as it is sometimes put, there must be a common danger, a voluntary loss, and a saving of the imperilled property by that loss.[1]

SECTION II.

THAT THERE MUST BE A VOLUNTARY SACRIFICE OF PROPERTY FOR THE BENEFIT OF OTHER PROPERTY.

If the sacrifice or loss be not voluntary, the very foundation of the claim is taken away, as that is the right which he, who inflicts upon himself a loss for the benefit of another, has to compensation. It must be necessary, or justified by reasonable cause, for, if it be not, it is only the wanton destruction of property by those who are in charge of it, and they or their employers must respond to the full value of what is lost. It must be successful, for if it does not save other property or interests, there is, in the first place, no sacrifice, as it may be presumed that the property jettisoned would have been lost with the rest; and, in the next place, if no one is benefited by the sacrifice, no

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[1] Barnard *v.* Adams, 10 How. 270, 303; Nimick *v.* Holmes, 25 Penn. State, 366. In Barnard *v.* Adams, Mr. Justice *Grier* said: "In order to constitute a case for general average, three things must concur: 1st. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder. 2d. There must be a voluntary jettison, *jactus*, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole. 3d. This attempt to avoid the imminent common peril must be successful." See also, Sturgess *v.* Cary, 2 Curtis, C. C. 59, 66.

one can be called on to contribute a portion of what was saved for him, in order to make the loss equal. These three essentials we shall now consider separately.

In the first place there must be a voluntary sacrifice.

The most usual form of this is a jettison of cargo to lighten the ship. There are, however, many others. If the masts are cut away to relieve the ship, and with the sails and rigging are lost, this is a kind of jettison of them.[1] So, if a boat is cut away from the davits; but if it was its position on the stern or side davits which incumbered the ship, and made it necessary to cut it adrift, and it should not have been in this position, this loss gives no claim, for although voluntary in one sense, yet it arose from the fault of the ship-owner or master. This has been a somewhat disputed question; but a ship must have its boats, and they must be somewhere, and if they are where they ought to be and are then cast off to relieve the ship, the case is precisely the same on principle as if the masts were cut away.[2] So, too, the loss of the anchor and cable, or either, by cutting the cable to avoid impending peril, gives a claim for contribution.[3]

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[1] Walker *v.* United States Ins. Co. 11 S. & R. 61; Sims *v.* Gurney, 4 Binn. 513, 525; Potter *v.* Providence Washington Ins. Co. 4 Mason, 298; Greely *v.* Tremont Ins. Co. 9 Cush. 415. See also, Scudder *v.* Bradford, 14 Pick. 13. If the masts are on fire and are cut away to save the ship and cargo, assuming that they are of value at the time they are cut, and the vessel is thereby saved, is this a case of contribution? This question was raised but not decided in the case of Lee *v.* Grinnell, 5 Duer, 400, 411. The reasons why they should not be contributed for are thus stated by Mr. Justice *Duer:* "The cutting away, so far from being a sacrifice of the masts and spars, was a measure for their preservation. So far from destroying any value which they then had, it was the only means by which any part of their original value could be restored and saved."

[2] Benecke & Stevens on Av. (Phillips' ed.), p. 67, 369; Lenox *v.* United Ins. Co. 3 Johns. Cas. 178; Hall *v.* Ocean Ins. Co. 21 Pick. 472.

[3] Walker *v.* United States Ins. Co. 11 S. & R. 61. In Birkley *v.* Presgrave, 1 East, 220, the vessel, while entering Sunderland harbor, was struck by a squall, which prevented her from proceeding further; and the small bower anchor was let go to bring her up. The vessel was then allowed to run along-side of a pier, and was fastened to it by the proper ropes, which were usually employed for that service. The master, seeing another ship drifting towards his own, and being apprehensive, that, if she struck, the ropes already used would not be sufficient to hold his vessel, cut the cable from the best bower anchor, and, while fastening his vessel to the wharf, with the cable so cut off, the other ship struck his, the ropes broke, and if there had been a moment's delay in thus using the cable the ship would have gone adrift, and probably struck on a bar, and have foundered. As it was, the cable saved her. It was held, that the damage

If the vessel was obliged to anchor in an unusually dangerous place, to avoid a worse danger, or upon a rocky bottom which threatened to chafe or cut the cable, or catch and break the anchor, and in this way either or both were lost, it might be a difficult question — of fact, however, rather than law — whether this was an average loss. The question would be, was it a voluntary sacrifice, or only an exposure to one of those sea perils which the ship must encounter whenever they occur, and which would bring this loss rather within the description of loss by wear and tear, than of voluntary sacrifice. It is obvious that this must depend on the circumstances of the case. We should say, however, that a loss of this kind should not be considered as voluntary, and, therefore, should not be regarded as an average loss, unless the anchoring in that place or way was unusual and unnecessary, except for the purpose of saving the cargo from some peculiar peril, and, but for this purpose, would not have been done.[1]

So, if the bulwarks or stanchions or bulkheads or decks of the ship are cut away for the purpose of saving the goods, this would be an average loss,[2] unless, the ship being ultimately lost, nothing additional was lost by the previous injury, or unless this injury was made necessary by the fault of the ship or of the lading.

There is one kind of sacrifice, the effect of which has been so much discussed, and it is generally said that the law is unsettled or uncertain in respect to it. We refer to the voluntary

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done to the cable by cutting it and by the wear, should be contributed for in general average, because it was used in an extraordinary manner. See Ord. de la Mar. liv. iii. tit. vii., Des Avaries, art. 6.

[1] A case of this kind is mentioned by Mr. Phillips, in his Treatise on Insurance (vol. 2, § 1285), as having been decided by referees in Boston, he being one of them. "A vessel lying in Funchal Roads was driven in a gale, and dragged her anchor nearly a mile, until she brought up, at a short distance from a rocky shore. After the gale had abated in some degree, but while it still continued with very considerable violence, the sea, at the same time, setting towards the shore, the master attempted to raise the anchor for the purpose of removing to a more safe anchoring ground. It was, however, found to be impracticable to raise it, and to avoid the danger of the situation, — since, in case of the anchor's dragging, or the cable's parting, the vessel would have gone upon the rocks, — he cut his cable. The loss of the cable and anchor was considered to be the subject of contribution, and the whole value allowed, because it was thought that in favorable weather, when the vessel could, without any immediate danger, have remained in her situation, the anchor might have been recovered."

[2] Dig. 14, 2, 2, 3; Nelson *v.* Belmont, 5 Duer, 310.

stranding of a ship. But we cannot see why the law on this subject is not entirely plain and certain, although it may be difficult to apply it accurately in many cases.

We should state the rule of law thus: If a ship must inevitably be cast upon a shore, and all that the master does is to select a place, a time, and a mode of stranding, this is not a voluntary sacrifice, and, therefore, not an average loss. But if the master has a substantial and valuable chance of saving his ship, although this chance may not amount to a probability, and voluntarily throws this chance away in order to make sure of saving his cargo, the cargo must contribute to repay the loss. We cannot doubt that this must be the rule, although, as we have said, it may often be difficult to know on which side of the rule a case falls.[1]

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[1] The two questions, which have given rise to the most discussion, when a claim for average has been made, for the benefit of a ship, which has been voluntarily stranded, are, 1st. What is to be considered as a voluntary stranding? and, 2d. Do the shipowners have a claim for average, if, by the voluntary stranding, the vessel is totally lost? The earliest case on the first point is Sims *v.* Gurney, 4 Binn. 513. The vessel would have gone ashore at any rate, and probably on a certain part of the coast. The master directed her course to another place, which was in no degree better calculated either for the safety of the ship, or of the cargo. Yet this was held to be a case for a general average contribution. The correctness of the doctrine laid down in this case we feel compelled to doubt. We are unable to see, if no advantage is to be derived from an act, how it can be said to be done for the benefit of any of the parties interested. It is true, that Mr. Justice *Grier*, in Barnard *v.* Adams, 10 How. 270, 302, speaks of this case, among others, as having received the "unqualified assent," and the "unanimous approval," of the Supreme Court of the United States, yet it is evident that it is to be considered as confirmed only so far as the *facts* of the case in the Supreme Court rendered it an authority. And we shall see that it goes far beyond even Barnard *v.* Adams. In Col. Ins. Co. *v.* Ashby, 13 Pet. 331, the jury found that the stranding was voluntary, and the point in question was not discussed by the court. Yet this case is often cited as one in which the court held, on the facts, that there was a voluntary stranding. In Meech *v.* Robinson, 4 Whart. 360, the vessel must have gone ashore at any rate, and would inevitably have been lost, together with the crew and cargo. She was run ashore in a less dangerous place, and was totally lost, but the lives of the crew, together with a portion of the cargo, were saved. It was held, that this was not a case for a general average contribution. Walker *v.* United States Ins. Co. 11 S. & R. 61, has been supposed to confirm this case, but the distinction between them is very obvious. In this latter case the court held, as a matter of fact, that when the captain slipped his cables, it did not appear that it was his intention to run his vessel ashore, but rather to get her out to sea, and, failing in this, he was driven on shore against his will. Meech *v.* Robinson has, however, been overruled by Barnard *v.* Adams. In this case the vessel was drifting, in a gale, towards a rocky and dangerous part of the coast, on which, if she had struck, she must inevitably have perished,

If the stranding be accidental, it may be followed by expensive and successful endeavors for saving the property or some part of

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together with the crew and cargo. To avoid this peril, she was steered along the coast and finally run on a beach, and all the cargo saved. This was held to be a case of general average contribution. The vessel was not destroyed, but she was so high on the beach that it would have cost more to have got her off than she would have been worth when off. A somewhat similar case came before the Circuit Court for the First Circuit in 1854. Sturgess *v.* Cary, 2 Curtis, C. C. 59. The vessel was at anchor, but in imminent danger of going to pieces by being driven on a rocky shore, by the violence of the wind and sea. To save the cargo and the lives of the crew, she was run on a beach. Contrary to expectation the vessel was not lost, but was subsequently got off and repaired. For the expenses thereby incurred, the owners of the cargo were held liable to contribute. See also, Reynolds *v.* Ocean Ins. Co. 22 Pick. 191, 197. Let us now pass to the consideration of the second question, whether there is to be contribution if the vessel is, by the stranding, totally lost. On this point there is a slight conflict of authorities, but the law may now be considered as well settled. Emerigon, ch. xii. § xli. (Meredith's ed. 475), states the law as follows: "Damages occasioned by stranding are particular averages for account of the owners. But it would be general average if the stranding had been voluntarily effected for the common safety, as we have seen above, provided always, that the vessel has been set afloat again; *for if the stranding is followed by a shipwreck it is sauve qui peut.*" The question first arose in this country in an early Virginia case, Eppes *v.* Tucker, 4 Call, 346, decided in 1790, in which it was held, that if the ship was lost by the stranding, there could be no contribution. And in the case of Bradhurst *v.* Col. Ins. Co. 9 Johns. 9, it was held, under similar circumstances, that no contribution was due. A contrary decision was given by Mr. Justice *Washington*, in Caze *v.* Reilly, 3 Wash. C. C. 298. In this case a vessel was voluntarily run ashore to escape capture from a British frigate. It was held, that the goods saved should contribute. In Col. Ins. Co. *v.* Ashby, 13 Pet. 331, the whole subject was elaborately investigated by Mr. Justice *Story*, and the authorities critically reviewed. He held, in accordance with what may now be considered as the settled doctrine, that the ultimate loss of the ship made no difference in regard to the liability of the owners of the cargo to contribute. See also, Gray *v.* Waln, 2 S. & R. 229; Mut. Safety Ins. Co. *v.* Cargo of the Brig George, Olcott, Adm. 89; Barnard *v.* Adams, 10 How. 270. Bradhurst *v.* Col. Ins. Co. *supra*, is, however, supported to some extent by a recent case in New York. Marshall *v.* Garner, 6 Barb. 394. The case of Cutler *v.* Rae, Ms., which was an action for contribution brought by the owners of the vessel against the owners of the cargo, was decided in favor of the libellant in the District and Circuit Courts for the District of Massachusetts. The case was then taken on appeal to the Supreme Court of the United States, and dismissed for want of jurisdiction. 7 How. 729. A suit was then commenced in the Supreme Court of Massachusetts, which was decided in favor of the defendants. No opinion was given in court, and the case is not yet reported, but we understand that it was decided on the ground that the stranding was not voluntary. The facts of the case were substantially as follows: The barque Zamora was at anchor in Massachusetts bay near Plymouth, in a violent gale of wind, with a high rocky coast under her lee. The anchors would not hold, and the vessel was being forced, stern foremost, towards a projecting rocky point, where the vessel and all on board must have perished. The captain made sail, slipped the cables, and endeavored to run along shore till he could find a safe place on which he might beach the vessel. While

it. And these constitute a claim for general average, which rests upon one interest or another according to the principles we shall state when speaking of the contributory interests.

In general, it has been found very difficult to determine when and to what extent mere expenses constitute an average loss. Thus, a ship by sea peril is compelled to go into a port which is out of her way, and there be repaired. On whom does the cost of this repair fall? It might not be easy to answer this question with certainty on the authorities, but on principle, we should say with little hesitation, that they fall wholly on the ship, unless in one of the following exceptional cases.

The first, is where the repairs are made necessary by an injury voluntarily inflicted or undergone to save the property.[1] The second, where they are temporary repairs, necessary only to enable the ship to save the cargo and transport it to the destined port, and there cease to be of any value to the ship, either because a permanent repair requires their removal, or for any other cause. The third, when there is an excess of expense, caused by the ship's being repaired at that time and place for the sake of the cargo, when otherwise the repairs would have been delayed and have been made in a cheaper place, or otherwise at less cost; then this excess of cost becomes an average loss, for which every thing benefited by it must contribute.[2]

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on the way the vessel struck on a sunken rock, passed over it, and went ashore among other rocks. The lives of the crew were saved, and also the cargo, though in part damaged. The vessel was totally lost.

[1] See Reynolds *v.* Ocean Ins. Co. 22 Pick. 191; Bradhurst *v.* Col. Ins. Co. 9 Johns. 9; Sturgess *v.* Cary, 2 Curtis, C. C. 59. And where damage was done to the vessel by the swelling of the cargo caused by pouring water down to extinguish a fire, it was held to be a subject of general average. Nelson *v.* Belmont, 5 Duer, 310, 322; Lee *v.* Grinnell, 5 Duer, 400.

[2] It was held, in Padelford *v.* Boardman, 4 Mass. 548, that repairs generally do not go to the account of general average. See also, Ross *v.* Ship Active, 2 Wash. C. C. 226; Jackson *v.* Charnock, 8 T. R. 509; Emerigon, ch. xii., s. xli. (Meredith's ed. p. 481). In Brooks *v.* Oriental Ins. Co. 7 Pick. 259, the vessel, having received damage in a storm, was partially repaired at the Balize. These repairs were considered, by the court, to be strictly necessary, and to be of no value to the vessel after her return home. Speaking of the general question, the court said: "As to the third question, it is contended for the defendants, that the temporary repairs should be charged to general average; and we are referred to Plummer *v.* Wildman, 3 M. & S. 482, which, in several particulars, resembled the case at bar. The ship had been run foul of, and so much damaged as to make it necessary to return to her port to repair, to enable her

But beside the direct expense of repairs, there is the expense of paying and maintaining the crew while they are being made, and while the ship is seeking the port where they may be made. In France the authorities are conflicting,[1] and there is some difference between the law of England and of this country, upon this subject. In England, the tendency of authority would seem to be against bringing the wages and provisions into general average, unless the repairs were made necessary by a loss which was itself an average loss. Thus, if a mast were cut away to save ship and cargo, and the ship thereupon changed her course and sought a port of repair, the wages and provisions from the time she changed her course, would be considered as a part of the sacrifice made by cutting the mast away. But if the same mast were blown away, and under the same necessity, and for the same purpose, the ship sought the same port for repair, the wages and provisions during the voyage to the port, and while the repair was going on, would be classed with the loss of the mast, and the whole of it be considered as falling on the ship alone.[2] But if the crew are discharged, and are then

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to perform the voyage, and she was afterwards completely repaired at the end of the voyage. The expenses of repairs which were made abroad, which were strictly necessary to enable the ship to perform her voyage, were placed to the account of general average. *Bayley*, J., doubted whether the repair of any particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship. The court considered those repairs only under the account of general average, which were absolutely necessary for the enabling of the ship to pursue her voyage; and all beyond were to be set down to the account of the ship. Therefore, deducting the benefit, if there be any, which still results to the ship from the repair, the rest may be placed to the account of general average." In Hassam *v.* St. Louis Perpet. Ins. Co. 7 La. Ann. 11, the vessel was injured by a storm, and put into a port for repairs. It was agreed that the voyage could not have been completed without the repairs, that the cargo could only have been sold at a great sacrifice, and that no means of transshipping and sending it on presented themselves, yet the court held that the expenses thus necessarily incurred were not the subject of general average. See also, Sparks *v.* Kittredge, U. S. D. C., Mass., 9 Law Reporter, 318, and post, § 5.

[1] Emerigon, c. xii., s. xli. § 5, Meredith's ed. 480, and Pardessus, art. 741, vol. 3, p. 228, contend that expenses attending the delay, such as wages and provisions, are subjects of general average contribution. On the other hand, Lemonnier, who has critically examined the subject, is of the opinion that these expenses are not to be contributed for. Lemonnier, Ass. Maritime, vol. 2, p. 107, 113, Paris, 1843. In this he is supported by Boulay Paty. These authorities, however, admit that if the going into port was caused by a general average loss, the expenses there incurred are to be contributed for.

[2] The two leading cases on this subject in England are Plummer *v.* Wildman, 3 M.

hired as common laborers, their wages are the subject of a general average contribution.[1]

In this country, however, it seems to be settled that whether the loss itself which makes the repair necessary, be an average loss or a partial loss, that is, in the case just supposed, whether the mast were cut away or blown away, it is equally for the benefit of all the interests, that is, of the ship, the cargo, and the

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& S. 482, and Power *v.* Whitmore, 4 M. & S. 141. In the first case, the ship while on a voyage was run into by a brig, which was unavoidably driven against her by the violence of the wind and weather. By the collision her false stem and knees were broken, and the master was obliged to cut away part of the rigging of the bowsprit, and to return to port for repairs. A claim for contribution in general average was made and allowed for the expenses incurred for pilotage into port; for surveying and ascertaining the damage, and repairing the same; for the materials used; for the smith's and carpenter's work; for wharfage and cooperage, on landing and stowing the goods during the repairs, and for reloading them, but a claim for the master's expenses during the time of the repairs, and for crimpage to replace deserters during the same time, was not allowed. The question in regard to the wages of the crew was not raised. In Power *v.* Whitmore, 4 M. & S. 141, the court held that where a ship sustained damage in a tempest, and put into a port to repair, neither the expense of the repairs, nor the wages and provisions of the crew, during the delay consequent thereon, were a subject for general average. These two cases appear to be diametrically opposed to each other. The language of Lord *Ellenborough* in the first case is as follows: "If the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity, may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment." In Power *v.* Whitmore, Lord *Ellenborough* distinguished the two cases, on the ground that in the former the master was compelled to cut away the rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed. And in a recent case in England, Hallett *v.* Wigram, 9 C. B. 580, there is a dictum to the effect that if the injury which led the vessel to seek a port of refuge was itself a subject for general average, then, the wages and provisions of the crew, and other expenses during the detention, are to be contributed for in general average, but otherwise, not. It is however questionable whether this distinction really exists between the two cases, notwithstanding the language of Lord *Ellenborough* as reported in Power *v.* Whitmore. In the first place, though the master cut away the rigging, it does not appear that he did it for the safety of the ship. It was not made a charge upon the cargo, and *Holroyd, arguendo*, expressly says that there was no proof that the cutting away of the rigging was necessary for the preservation of the ship. And, in the second place, admitting that it was necessary, still the other damage was caused by the collision, and the repairs, made necessary by this peril, should not, if the distinction be correct, have been contributed for. See also De Vaux *v.* Salvador, 4 A. & E. 420.

[1] Da Costa *v.* Newnham, 2 T. R. 407.

freight, that the ship should go where she can be repaired and enabled to prosecute her voyage. And therefore the wages and provisions are regarded as an average loss, from the time the ship leaves her proper course, until the repairs are made, and she is again pursuing that course; although the direct cost of the repairs themselves may rest on the ship alone as a partial loss.[1]

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[1] Walden *v.* Le Roy, 2 Caines, 263; Thornton *v.* U. S. Ins. Co. 3 Fairf. 150; Henshaw *v.* Mar. Ins. Co. 2 Caines, 274; Padelford *v.* Boardman, 4 Mass. 548; Barker *v.* Phœnix Ins. Co. 8 Johns. 307, 318; Potter *v.* Ocean Ins. Co. 3 Sumner, 27; Shelton *v.* Brig Mary, U. S. D. C., Mass., 5 Law Reporter, 75; Hanse *v.* N. O. Mar. & F. Ins. Co. 10 La. 1. See also, Ross *v.* The Ship Active, 2 Wash. C. C. 226; Bixby *v.* Franklin Ins. Co. 8 Pick. 86, more fully reported, 3 Sumner, 46, note. In Giles *v.* Eagle Ins. Co. 2 Met. 140, it was held that if a ship went ashore in a storm, and was got off and repaired, the wages and provisions of the crew during the time of the repairs were not a subject of general average contribution. The case was decided on the authority of the English decisions, and Mr. Phillips says it seems to be in direct conflict with our settled doctrine and practice. 2 Phil. Ins. § 1329. We think, however, that the decision is correct, though it does not seem to proceed on what may be called the American doctrine. It is to be observed that the repairs were furnished at the port where the disaster happened. There was therefore no deliberate and voluntary resort to the port for the purpose of refitting, and the case therefore comes within the exception pointed out by Mr. Justice *Sewall* in Padelford *v.* Boardman, 4 Mass. 548, 552. See also, Spafford *v.* Dodge, 14 Mass. 66, 74. The answer to this will probably be that since the court allowed the wages of the other persons hired to get the vessel off, this showed that the expense was considered as a general average one. This is owing to a confusion of the phrase "general average." Such an expense was not strictly speaking a general average expense, there being no voluntary sacrifice, but the expense having been incurred in consequence of a direct peril of the sea, a liability was thereby imposed upon the interests benefited, somewhat similar in its nature to a general average. Although this distinction may appear somewhat hypercritical, yet it seems to us to be the only one by which the authorities can be reconciled, and, moreover, it is fully justified by the language of the court in Greely *v.* Tremont Ins. Co. 9 Cush. 415, 421. In Gazzam *v.* Cinn. Ins. Co. 6 Ohio, 71, it was held that where a vessel, insured on a time policy, was stranded on a rock, the wages of the crew during the detention were not the subject of a general average contribution, the crew being retained under their original agreement. But where a vessel was purposely run ashore, in order to save the cargo, it was held that the wages of the crew while employed in laboring for the joint benefit of the adventure, were a proper charge in general average. Barnard *v.* Adams, 10 How. 270.

In South Carolina the English rule is adopted. Union Bank of South Carolina *v.* Union Ins. Co. Dudley, S. C. 171. It is true that the policy referred to the usages of London as the standard by which the liabilities of the company were to be ascertained; but it was stated that the custom as to wages was the same in the city of Charleston. In Wightman *v.* Macadam, 2 Brev. 230, the vessel, while on a voyage from Havana to Charleston, put into Savannah. The goods were delivered to the owner on payment of *pro rata* freight. Held that he was not obliged to pay for the wages and provisions while there, but only for attendance on the vessel while coming into port, for pilotage,

And the other expenses of getting a ship into port after meeting with a peril, are to be contributed for in general average.[1]

So, if it be necessary to take out the goods in lighters, to relieve the ship, and save ship and cargo from peril, this expense must be averaged.[2] In one case, where a ship was stranded near her port of delivery, and lighters were sent which took out her cargo and carried it into port, the vessel never being got off, it was held that the expense of lighterage was an average loss, to which the cargo should contribute.[3] We can understand this case, however, only on the supposition (which a part of the statement indicates) that the lighters were considered as sent by all the parties, by agreement, for the common benefit, and therefore that the expense was incurred by all. On general grounds, we should have said that the ship had earned her whole freight by conveying the cargo to its destination, and must herself pay, or deduct from the freight the expense of the lighters in which it was earned.[4]

If the goods, which are taken out into lighters for the common benefit, are thereby, or while in the lighters, lost or injured, this generally constitutes an average loss;[5] but if, after the cargo is partly taken out, the ship and the cargo in her are lost, and the goods in the lighters saved, they do not contribute for

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harbor master's and health officer's charges, wharfage, expense of unloading, and perhaps for the protest. The wages and expenses of the crew during repairs made at the port of delivery are not to be contributed for. Dunham *v.* Com. Ins. Co. 11 Johns. 315; even if the insurance be on time. Perry *v.* Ohio Ins. Co. 5 Ohio, 305. Nor are they in any case when the voyage has been abandoned from necessity, and the vessel obliged to return home. See post, § 5.

[1] Lyon *v.* Alvord, 18 Conn. 66. In this case, the expense of towing a vessel which had struck on a rock, into port, was allowed in general average. And in Nelson *v.* Belmont, 5 Duer, 310, where a vessel accompanied another which had met with an accident, into port, the expense was allowed in general average. See also cases in note *supra*.

[2] 2 Phillips on Ins. § 1288; Benecke & Stevens on Average (Phillips' ed.), 133; Marshall on Ins. 538.

[3] Heyliger *v.* N. Y. Firemen Ins. Co. 11 Johns. 85.

[4] In Lewis *v.* Williams, 1 Hall, 430, 444, the court said that this was strictly a case of salvage, and not *eo nomine* an average loss.

[5] Lewis *v.* Williams, 1 Hall, 430. See also, 1 Mag. 160, Case ix. Goods were taken out of a vessel which had sprung a leak at sea, and put on board other vessels that the leak might be discovered, and stopped. In consequence of this she was enabled to prosecute and complete her voyage. The goods taken out were captured; and were contributed for in general average.

the property lost, for it was not lost for their benefit, nor as a consequence of any measures taken for their advantage.[1]

So, if it be necessary for the general benefit to take out and store the cargo until the ship is repaired, and then return it, the whole expense of this is to be averaged,[2] and if the goods are damaged in consequence of such removal, they are to be contributed for.[3] So, too, the expenses of pumping out a ship for the common good, or, indeed, any similar expense,[4] as scuttling, is a general average expense.[5]

We have no doubt that a ransom paid in good faith, to any captor, whether piratical or belligerent, would be regarded in this country as an average loss.[6] And in England it would seem to

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[1] Benecke & Stevens on Average, Phillips' ed. p. 65; Molloy, Book 2, c. vi. s. xii.

[2] Barker *v.* Phœnix Ins. Co. 8 Johns. 307, 318. And the law is the same in England, although the repairs were rendered necessary by a peril of the sea. The Copenhagen, 1 Rob. Adm. 289, 294; Plummer *v.* Wildman, 3 M. & S. 482; Hall *v.* Janson, 4 Ellis & B. 500, 29 Eng. L. & Eq. 111. See post, § 5.

[3] Hennen *v.* Mouro, 16 Mart. La. 449. In Shelton *v.* Brig Mary, U. S. D. C., Mass., 5 Law Reporter, 75, it was necessary to remove the cargo in order to repair the vessel, but the cargo was so much damaged that it was also necessary to unload it for its own preservation. While on shore, part was destroyed by fire. Held, under these circumstances, that no contribution was due, as the owner could not be considered as having made a voluntary sacrifice, for the purpose of prosecuting the voyage. And in Bond *v.* The Superb, 1 Wallace, Jr., 355, it was held that the removal of part of a cargo of perishable fruit in a port of necessity, for the purpose of repairs, which increased an incipient decay, and hastened a partial destruction of the fruit, did not give the owner of the cargo a claim for general average. In 2 Wharton's Dig. 48, tit. Ins. 142, it is said that such a loss is no answer in whole or in part to a claim on the part of the owner of the vessel for contribution from the cargo, citing Berg *v.* Bond, Adm. E. D. Pa., affirmed 1 Wallace, Jr., 356. We have, however, been unable to find any report of the case in 1 Wallace, Jr.

[4] Orrok *v.* Commonwealth Ins. Co. 21 Pick. 456, 469. See also, Nelson *v.* Belmont, 5 Duer, 310, 325. So, in Giles *v.* Eagle Ins. Co. 2 Met. 140, it was held, that expenses incurred in hiring men to assist the crew in getting off a vessel, which had gone ashore in a storm, should be contributed for, though the expenses of the crew should not be.

[5] Nelson *v.* Belmont, 5 Duer, 310. See also, Lee *v.* Grinnell, 5 Duer, 400.

[6] If a portion of the cargo be delivered up to a pirate by way of composition, the remaining part must contribute. See cases cited post, p. 299, note 4. And Mr. Phillips, in his Treatise on Insurance, vol. 2, § 1336, says: "It was formerly the practice to ransom vessels captured by the public enemy, and to give hostages as security for the payment of the ransom, in which case the amount of the ransom, as well as the expenses of the hostage during his detention, were settled by general contribution. (Emer. tome 1, p. 474, 629, 630; Lopes *v.* Winter, Postlethw. Dict. tit. Average.) But more recently, *laws have been enacted prohibiting compositions with a public enemy* (22 Geo. III. c. 35; 35 Geo. III. c. 66, s. 37–39), *and such compositions have been considered illegal, though not prohibited by specific laws.*" For this last proposition no authority is

be so if the capture be piratical. But an English statute prohibits ransom to an enemy;[1] and under this statute it has been held, that if a master ransoms his ship and brings her home, the owner may take her from him without repaying what he expended, nor would the owner be obliged to repay money which was borrowed for this purpose.[2] And the master would not be liable for the debt to the lender.[3]

If a pirate, or captor, select what he chooses from the cargo or furniture of the ship and take it away, leaving the rest, what is left shall not contribute towards what was taken, because it was not saved by the taking.[4]

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cited by the learned author, and we are inclined to doubt whether it be correct on principle or on authority. Every writer on international law speaks of ransom between belligerents as undoubtedly lawful, except when it is prohibited by statute. Mr. Justice *Story*, in Maisonnaire *v.* Keating, 2 Gallis. 325, 338, said: "The very law of war prohibits all commercial intercourse, and suspends all existing contracts between enemies; *and the case of ransoms is almost the only exception, which has been admitted, from the general rule.*" See also, Chitty's Law of Nations, 90; 2 Azuni's Maritime Law of Europe, 313; 2 Molloy, c. vi. s. xiii.; Polson and Horne, Law of Nations, 46; Wheaton's Elements of Inter. Law, 478; The Hoop, 1 Rob. Adm. 196, 201; Ricord *v.* Bettenham, 3 Burr. 1734. In this last case an action was sustained in England on a ransom bill given by the captain of an English vessel which had been captured by a French privateer. See also, Girard *v.* Ware, Pet. C. C. 142. This was a suit brought by the respondents, the libellants in the court below, for wages. The ship of the appellant, to which they belonged, was captured by the British within the capes of Delaware. She was afterwards ransomed by the owner and brought to Philadelphia. Held, that the appellees were entitled to full wages, subject to a contribution on account of the ransom. In Maisonnaire *v.* Keating, 2 Gallis. 325, it was argued that a contract for a ransom made between a belligerent and a neutral, immediately after capture, was illegal, because every ransom supposed a vested right in the captors, and that this did not exist in respect to neutrals, on the ground that the captors had only a right to bring in for adjudication, and that neutral property was only liable to condemnation in case of delinquency, but it was held, by Mr. Justice *Story*, that the right to take a ransom was not founded in a vested title, nor was it, strictly speaking, a repurchase of the captured property, but a relinquishment of all the interest and benefit, which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal, and that, therefore, the right to take a ransom existed from the moment of capture. See also, Welles *v.* Gray, 10 Mass. 42; Clarkson *v.* Phœnix Ins. Co. 9 Johns. 1. If, therefore, a ransom is made for the benefit of all concerned, it is clearly a case of general average. Douglas *v.* Moody, 9 Mass. 548; Sansom *v.* Ball, 4 Dall. 459.

[1] 45 Geo. III. c. 72, s. 16. See also, 2 Azuni on Maritime Law, Part II. ch. iv. art. vi. § 12.

[2] Parsons *v.* Scott, 2 Taunt. 363.

[3] Webb *v.* Brooke, 3 Taunt. 6.

[4] Dig. 14, 2, 2, 3; Hicks *v.* Palington, F. Moore, 297; 1 Mag. 64; Beawes, Lex Mercatoria, p. 149, tit. Gen. Average; Nesbitt *v.* Lushington, 4 T. R. 783.

Besides the delay or detention of a ship for the purpose of repair, there are other causes which detain a ship on her voyage; and sometimes for a long time. These may give rise to difficult questions. It is a general rule, that no expenses of delay or detention are averaged, unless the voyage had been begun previous to the detention, and was suspended by it. For otherwise it would be only a hinderance or prevention of the voyage, and this cannot be a ground for contribution.

If a ship be detained, on her voyage, by an embargo, it may be regarded, as a general rule, that the wages and provisions of the crew are not an average expense; for this is no voluntary sacrifice.[1] So, too, with delay by quarantine;[2] or while wait-

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[1] In Da Costa *v.* Newnham, 2 T. R. 407, which was a case of a ship going into port for repairs, and the question being raised whether the wages and provisions of the crew should be compensated for in general average, Mr. Justice *Buller* said: "As to the wages and provisions, this is not like the case where a ship is detained by an embargo, where the court have said that the expense shall fall on the owner only, and the freight must bear it." In this country the current of decisions is in favor of the proposition that wages and provisions, during a detention by an embargo, are not a subject of general average. M'Bride *v.* Mar. Ins. Co. 7 Johns. 431; Harrod *v.* Lewis, 3 Mart. La. 311; Peuny *v.* N. Y. Ins. Co. 3 Caines, 155. But a contrary decision has been given in Pennsylvania, Ins. Co. of N. A. *v.* Jones, 2 Binn. 547, overruling the same case in the Supreme Court, 4 Dall. 246. See also, Kingston *v.* Girard, 4 Dall. 274. The authorities are much more conflicting on the point whether expenses incurred during a detention by capture are the subject of general average contribution. In Spafford *v.* Dodge, 14 Mass. 66, 74, Mr. Justice *Jackson* states the law as follows: "As to the wages and provisions of the crew during the detention, we are unable, notwithstanding the very respectable authorities cited in support of this claim, to see any ground on which we can allow it, consistently with the established principles on this subject, and the course of decisions in this State. The only case, in which this charge has been allowed in an account of a general average in our courts, was where it was necessary to go into port, to repair damages sustained during the voyage from the perils of the sea; and the master, for that reason, voluntarily sought a port to refit. Here it is to be observed, the delay was voluntarily incurred by the master; *the mind and agency of man were employed* in producing it; and this circumstance is deemed essential in every case of general average, in contradistinction to such unavoidable detentions and losses, as arise from accident beyond the control of the master. We see no ground of distinction in this respect, between a temporary detention, occasioned by a hostile seizure and one which is occasioned by an embargo, or by a tempest, or other common peril of the sea. . . . . The ship-owner might as well claim a contribution for the wear and tear of his ship during the detention, or the owner of the cargo for the interest of his money, for the deterioration of his merchandise, or for the loss of a market by the delay, as the owner of the freight for the extraordinary wages and provisions expended on such an occasion." The point has, however, been generally decided otherwise. Leavenworth *v.*

[2] Stevens & Benecke, by Phillips, 165.

ing for convoy;[1] or by being frozen up while pursuing the voyage.[2]

In all these, or any cases of delay or detention, even before the voyage begins, it is always possible that there may be a necessity of expending money for the common benefit. And such expenditure, especially if it be required by some extraordinary emergency, and is incurred so strictly for the common good that no necessity or advantage which belongs to any one interest alone would have caused it, becomes an average loss, to which all the interests benefited, and only those, must contribute. On this ground it is quite clear that expenses incur-

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Delafield, 1 Caines, 573; Hurtin *v.* Phœnix Ins. Co. 1 Wash. C. C. 400. A distinction is made in the last cited cases between an embargo and a capture. It is said that a capture dissolves the contract, while an embargo does not, and that, therefore, in the latter case the seamen are under obligations to remain by the vessel, while in the former they are at liberty to depart, and if they remain, this is a voluntary act on their part, and their wages and provisions, therefore, are a subject of general average contribution. And on this ground alone the court distinguish the case of Penny *v.* N. Y. Ins. Co. from that of Leavenworth *v.* Delafield. This distinction is shown to be incorrect in Spafford *v.* Dodge, and it is there held, that the contract is no more dissolved in the one case than in the other, and this proposition is sustained by high authority. The Nathaniel Hooper, 3 Sumner, 542, 557. The law laid down in Massachusetts seems, therefore, to be more consistent and better founded on principle than the New York doctrine. It has, however, been suggested, by an eminent writer on this subject (see Walden *v.* Le Roy, 2 Am. Leading Cases, 1st ed., 404, 424, where the question is fully and learnedly discussed), that the inquiry is not whether a capture, under ordinary circumstances, terminates a contract of affreightment, but it is said, that "general average has its origin in the intervention of a *vis major*, introducing a new set of relations into the contract for the time being, apart from the effect, which it may have in abrogating it altogether; and that whenever this is the case, a sacrifice, voluntarily made, for the benefit of all, will render all liable for contribution, whether the party making it were or were not bound to pursue that course, in pursuance of the general duties of his position, or under the express or implied provisions of any previous contract." In support of this view the illustration is given of a master being bound to cut away the masts, or slip the cables of his vessel, if such a course were necessary to prevent the ship and cargo from being stranded or otherwise injured by any great disaster, "and yet," it is said, that "it has never been supposed that because his action, in this respect, was done in discharge of the obligation imposed by his position, the owners of the cargo were entitled to deny the character of general average to the loss thus occasioned, or to say, that if what had been done were necessary for the safety of the cargo, it was done in pursuance of the prior obligations of the master and owner; and, if it were not that no contribution could be claimed for a sacrifice which had not been beneficial."

[1] Stevens & Benecke on Average, by Phillips, p. 149; Bynkershoek, Questiones Juris Privati, lib. 4, c. 25. It is obvious that all these cases depend, for their solution, upon the construction to be given to the contract, as set forth in the preceding note.

[2] 1 Mag. 67.

red after a capture, in defending the property, preventing condemnation, or obtaining a release, or escaping, are average expenses.[1] So, too, if a crew are voluntarily detained because there is a rational possibility of release, and they will then be wanted to navigate the ship, the wages and provisions should be a general charge in the nature of general average, even if there be no release.

Where funds are raised for the common benefit, all the interests assisted must repay them; and also, all losses incurred necessarily in raising the funds, as damages, premiums, extra interest, brokerage, and the like.[2]

If goods are sold for such a purpose, there seems to be no reason why they should not be put on the footing of goods jettisoned.[3] If they are hypothecated by respondentia, and are lost,

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[1] "The necessary costs and charges, incurred and paid by the defendants in reclaiming and procuring the restoration of the ship and cargo, are undoubtedly to be allowed as a general average." Per *Jackson*, J., in the case of Spafford *v.* Dodge, 14 Mass. 66, 74. See also, Douglas *v.* Moody, 9 Mass. 548. But if the expenses incurred are only for the benefit of the cargo alone, or of the ship, only the thing benefited is to contribute. Peters *v.* Warren Ins. Co. 1 Story, 463, 469; Vandenheuvel *v.* United Ins. Co. 1 Johns. 406; Jumel *v.* Marine Ins. Co. 7 Johns. 412.

[2] Benecke & Stevens on Average, Phil. ed. 172.

[3] In The Gratitudine, 3 Rob. Adm. 240, 263 (which was a case of a master hypothecating his cargo to pay for necessary repairs), Lord *Stowell* said the books overflowed with authorities that the master might sell *part* of his cargo, and that a sale of part was equivalent to the hypothecation of the whole, and was a fit subject for general average. And Lord *Ellenborough*, in Dobson *v.* Wilson, 3 Camp. 480, 487, expressed his opinion that if a ship should be seized for the non-payment of the Sound dues, and it became necessary to sell a part of the cargo, in order to obtain her release, this might be the foundation of a claim for general average. See also, Richardson *v.* Nourse, 3 B. & Ald. 237; The Constancia, 4 Notes of Cases, 677. Mr. Justice *Story*, in the case of The Ship Packet, 3 Mason, 255, 260, said: "In the case of a sale of part of the cargo by the master for the necessities of the ship, the sale is in the nature of a compulsive loan for the benefit of all concerned, and to enable the ship to prosecute her voyage. It bears a considerable resemblance to the case of a jettison, for the owner is deprived of his property for the common good, and to him it must be immaterial whether the loss be by a sacrifice at sea, or on shore." See also, Giles *v.* Eagle Ins. Co. 2 Met. 140, 144, where the loss in the sale of a quantity of salt, which had been sold to pay the expenses incurred in getting off and repairing a vessel, which had been driven on shore in a gale, was compensated for in general average. But see post, tit. Bottomry, ch. 11, near the end of the chapter. In The Schooner Leonidas, Olcott, Adm. 12, 15, there is a *dictum* that where the master sells part of the cargo to supply the necessities of the ship, the owners would probably be entitled, in case the ship or owners could not satisfy their demand, to compel the other owners of the cargo to contribute according to their respective interests. In Shelton *v.* Brig Mary, 6 Law Re-

this discharges the bond, and the shipper loses nothing by it; if they are saved and applied to the payment of the bond, this gives the shipper a claim for contribution.[1]

If a ship be wrecked and the master forward the goods, the extra expense of doing so is charged either to the ship or to the goods forwarded, and does not come into general average.[2]

A claim analogous to that for contribution might arise by the sacrifice of property which was not at risk, nor even owned by any of the parties who had an interest in ship, cargo, or freight. If, for example, it should be necessary, for the purpose of saving from fire a ship with her cargo, which lies immovable at a wharf, to destroy property, whether another ship or a building or any thing else, and this is done by any one of the owners of the endangered ship or cargo, or by any person for him, it must be paid

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porter, 75, specie was shipped from Boston to Porto Cabello to purchase a return cargo. The vessel was obliged to put into Antigua, and while there the master, being destitute of funds, sold part of the specie for the purpose of making repairs, and the vessel proceeded to her port of destination, and thence to Boston. It was admitted that the specie should be paid for in general average, and it was held, that the owners were entitled to interest on the same from the time when they would have had the benefit of it at Porto Cabello, if it had been carried forward.

[1] We have seen, ante, p. 159, n. 2, that if a master of a vessel is obliged to put into a port of distress, he may either send on the cargo in another ship, or retain it and repair his own. If he has no money to pay for the repairs, and can raise none on the personal credit of the owner of the vessel, he may hypothecate the ship and cargo for that purpose. The question then arises in what case can the owner of the goods hypothecated call on the other shippers for a general average contribution. If another ship can be found to take the goods on, although the master has the right to detain them till his own ship is repaired, still, in such a case, the detention would clearly not be for the benefit of the goods, and it would seem that the other shippers should not contribute; but when no other vessel can be obtained, and the ship cannot proceed and complete the voyage without repairs, and there are no means of making them except by a hypothecation of the cargo, and this is done, we are strongly inclined to the opinion that the expense which is thus incurred should be made good by a general average contribution. This is clearly the opinion of Lord *Stowell*, in the celebrated case of The Gratitudine, 3 Rob. Adm. 240, 264, in which, after stating that all must finally contribute in the case of an actual sale of a part of a cargo, he adverts to the case of a hypothecation of the whole, which he considers equivalent to the sale of a part, and says: "All contribute in this, as a portion of the whole value of the cargo is abraded, for the general benefit, probably with less inconvenience to the parties, than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance." See also, The Constancia, 4 Notes of Cases, 677; The Ship Packet, 3 Mason, 255. But see post, tit. Bottomry, ch. 11, near the end of the chapter.

[2] 2 Phil. Ins. § 1341.

for by the party who does it; and then this payment might give rise to a claim for compensation in some form, against all the interests saved by it.[1] We may reverse the case, and suppose an injury inflicted upon the common property by one, either in wrong or for good reason, but such as gives to all who suffer a claim for indemnity. If this claim be enforced, the expense of doing so would be so far like that of general average, that none should be entitled to their share of the benefit, who did not advance or repay their share of the cost. But it has been held that the right to contribution, strictly so called, does not extend beyond those who voluntarily embark in a common adventure; and that if A's vessel is about to come into collision with B's, which is at anchor, and B cuts his cable and thus avoids it, he has no claim for contribution against A for the loss of the cable and anchor.[2]

All the immediate and direct consequences of a sacrifice, although these consequences were neither intended, nor beneficial, are to be taken as entering into and forming a part of the sacrifice; and the amount or value of them is to be added to the amount or value of the original and intended sacrifice, to ascertain the whole sum which is to be averaged as a loss for the common benefit.[3]

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[1] The twenty-first article of the twentieth chapter of the Ordenanzas de Bilbáo provides, that when a vessel catches fire in a river or harbor, and an adjoining vessel is sunk in order to save the others, the damage must be made good by a contribution from all the other ships and cargoes. See also, Casaregis, Disc. 46, n. 45, 63.

[2] The John Perkins, U. S. C. C., Mass., 1857, 21 Law Reporter, 87, 97.

[3] In Maggrath *v.* Church, 1 Caines, 196, the vessel, loaded with corn, encountered severe weather, and a mast was cut away for the general preservation. In cutting it away, it was splintered, and in consequence thereof water entered the hold and damaged the corn. *Kent*, J., said: "The corn being damaged by the cutting away of the mast, is to be considered, equally with the mast, a sacrifice for the common benefit — a price of safety to the rest; and it is founded on the clearest equity, that all the property and interest saved ought to contribute their due proportion to this sacrifice." See also, Saltus *v.* Ocean Ins. Co. 14 Johns. 138. In Lee *v.* Grinnell, 5 Duer, 400, 423, *Hoffman*, J., said: "The essential constituents of a case of contribution are, that the intelligence, the will, and the act of man have intended and produced the sacrifice of the thing for which compensation is sought, and have worked in whole or in part, the preservation of the property from which it is claimed. The subjects destroyed must have been, in the contemplation of the party, as things to be destroyed. This rule admits, indeed, of a few guarded exceptions, but none which may not be considered in the ordinary course of events, as comprehended within the intention. The cutting away of masts is probably as often accompanied with damage to boats and rail-

Let us now consider the cases which illustrate the requirement that the loss should be voluntary and intended,[1] and also for the benefit of other property. Thus, where dollars were thrown over to prevent their falling into the hands of an enemy, this was a voluntary and intended loss, but was not sustained for the benefit of other property, and therefore was not even presented to the court as an average claim.[2] So if sails are blown away, or masts, or rigging, or cables lost by the violence of the wind or sea, here is no average loss, because no voluntary loss.[3] And even if the sails or spars are lost by an extraordinary exposure in an emergency, as by an extreme press of sail to escape capture,[4] or wreck,[5] this would come near to an average loss; but the better opinion is, that it should rather be considered only as a loss by a sea peril. It would be very difficult to discriminate

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ings as otherwise, and this may well be assumed to have been an expected consequence. The leak, as in the case of Maggrath *v.* Church, may reasonably be anticipated as a probable result of the splintering of masts when cut away." The burden is on the owner of the cargo in such a case to show that the damage was thus occasioned. Shelton *v.* Brig Mary, U. S. D. C., Mass., 5 Law Reporter, 75. In Nimick *v.* Holmes, 25 Penn. State, 366, it was held that where a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam for the purpose of extinguishing the flames, and by tearing up part of the deck of the vessel should be contributed for in general average. But this would seem more properly to be a case of partial loss for which the insurers against fire would be liable.

[1] In Sansom *v.* Ball, 4 Dall. 459, the ship was captured, and afterwards recaptured. The amount of salvage due the recaptors was settled by a compromise, and for the amount so paid, an action was brought against the parties benefited for a general average contribution. The question was raised whether the payment to the recaptors was a voluntary act. The court said: "General average always arises from actions produced by necessity. In the case before us, there was a capture, recapture, and decree of salvage. The master and supercargo consented under these circumstances to a measure, which produced a general benefit. They surely exercised as much volition, as if they had thrown half her cargo overboard in a storm." In what cases a stranding will be considered as voluntary, see ante, p. 291, n. 1.

[2] Butler *v.* Wildman, 3 B. & Ald. 398.

[3] Digest, 14, 2, 2.

[4] Covington *v.* Roberts, 5 B. & P. 378. In this case a vessel was captured by a French privateer, but, on account of a heavy gale, the privateer could not take possession of her. To effect her escape, she carried an unusual press of sail, in consequence of which she was much strained, opened most of her seams, and carried away the head of her mainmast, but finally succeeded in getting away. Held that the damage to the vessel was not a subject for general average. Sir *James Mansfield*, C. J., said: "This is only a common sea risk. If the weather had been rather better, or the ship stronger, nothing might have happened."

[5] Power *v.* Whitmore, 4 M. & S. 141.

between such a case as this, and any earnest endeavor to escape from imminent danger. If, however, a cable be cut, and an anchor lost, or goods jettisoned to escape from an enemy, this is as certainly an average loss, as if done to escape wreck.[1] And the expense of hiring convoy, or other protection, for the common benefit, would certainly, if the necessity arose from some unexpected and extraordinary peril, be considered as general average, although the expenses of convoy, in the common way, are not.[2] So, if an armed ship gives battle to a pursuing enemy, and beats her off, the loss sustained in the battle, whatever it be, constitutes no average claim, because it is but a consequence of a discharge of the obligation of the ship to carry on the goods if possible; and the loss must rest where it is cast "by the fortune of war."[3]

If masts are overboard, and, hanging by the ship, embarrass or endanger her, and are cut away, this might be a general average loss, but only for the value of the masts and rigging as

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[1] Benecke & Stevens on Average, Phillips' ed. 154. Emerigon, in his treatise on Insurance, ch. xii. s. xli. § 5, Meredith's ed. 480, gives a very good illustration of this. The master of a French vessel, having been pursued by two frigates, and his flight being intercepted by two others ahead, as soon as it became dark, lowered his boat into the sea, with a mast and sail, and a lantern at the masthead, and then changed his course, and sailed all night without a light, and in this way escaped. The value of the boat was made good by a general average contribution. See also, Price *v.* Noble, 4 Taunt. 123.

[2] Benecke & Stevens on Av., Phillips' ed. 149, 151. And it has been held that where a vessel meets with an accident at sea, and is obliged to go into port and another vessel accompanies her for the common good, it is a general average expense. Nelson *v.* Belmont, 5 Duer, 310. It is stated by Mr. Stevens in his valuable essay on General Average, p. 16 (Benecke & Stevens on Av., Phillips' ed. p. 67), that "some of the foreign ordinances say, that if a cable be cut or slipt to sail with convoy, the value shall be brought into a general contribution; but this is not the practice with us."

[3] Taylor *v.* Curtis, 6 Taunt. 608. In this case a vessel was attacked by a privateer, but the latter was finally beaten off. The loss suffered was claimed as general average, but the claim was not allowed. *Gibbs*, C. J., in delivering the opinion of the court, said: "The losses, for which the plaintiffs seek to recover this contribution, are of three descriptions: first, the damage sustained by the hull and rigging of the vessel, and the cost of her repairs; secondly, the expense of the cure of the wounds received by the crew in defending the vessel; thirdly, the expenditure of powder and shot in the engagement. . . . . The measure of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there it seems to me they ought to rest. It therefore follows that these losses were not of the nature of general average, and that the plaintiffs cannot recover."

they then were, for only that is voluntarily sacrificed; and this value would generally be nothing.[1]

Gratuities to sailors, paid or promised, to increase their exertions during peril, have been held not to constitute an average loss, but to be a part of the expense of the ship. And if in a port of repair, or elsewhere, where wages and provisions constitute an average expense, extra wages to which the sailors are not entitled, are paid to them by mistake of law, these are not to be contributed for.[2]

We have already said, that if goods are carried on deck, the jettison of them gives no claim for contribution. We return to the subject to state more emphatically the reason of this rule. It is, that the law-merchant strongly discourages the carrying of goods on deck, not only because of the greater danger to them, but still more, perhaps, from the increase of peril caused by it to the ship and cargo, by its embarrassing the navigation of the vessel, and rendering her top-heavy.[3] For these reasons, if a

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[1] Nickerson *v.* Tyson, 8 Mass. 467; 1 Magens, 181; Emerig. c. 12, sect. 41, § 5; Ord. Copenhag. a. 1, § 10. In Benecke & Stevens on Average, Phil: ed. p. 111, it is said, that though it is the practice in most countries to allow for the rigging so cut, in general average, at the value which it may be supposed to have had under those circumstances, yet in England no such allowance is made. For this two reasons are given. First, because, it is said, the rigging was then of no value at all. This reason is not adopted by Mr. Benecke, because he says it cannot be denied to be still of some value. He then goes on to say: "The true cause, as it appears to me, is, that under such circumstances, generally speaking, it would be *impossible* to work the vessel without cutting away the broken mast, and the rigging in which it is entangled, so that this act was not optional, but dictated by necessity, and consequently there was no sacrifice. But if such a circumstance occurred in sight of a port, which the vessel might reach without the rigging being cut, and this measure be resorted to merely to facilitate the manœuvring of the vessel, and to give her and the cargo a better chance of escaping the danger; in that case it would indeed be a sacrifice, and the rigging, so cut away, ought to be allowed for, at the value which it would have had if not cut away."

[2] See post, ch. 12, § 2.

[3] Ord. de la Marine, liv. 3, tit. 8, art. 13; Consolato del Mare, par Pardessus, c. 186; Malynes, Lex Mercatoria, c. 26. The foreign ordinances generally are to the same effect. See those of Genoa, Antwerp, Lubeck, France, Rotterdam, Konigsberg, Hamburg, Bilboa, Copenhagen, Stockholm. See also, Myer *v.* Vander Deyl, before Lord *Ellenborough*, Dec. 1803, Abbott on Ship. 481; Johnston *v.* Crane, 1 Kerr, New Brunsw. Rep. 356; Smith *v.* Wright, 1 Caines, 43; Lenox *v.* United Ins. Co. 3 Johns. Cas. 178; Dodge *v.* Bartol, 5 Greenl. 286; Cram *v.* Aiken, 13 Maine, 229; Sproat *v.* Donnell, 26 Maine, 185; Hampton *v.* Brig Thaddeus, 4 Mart. La. 582; Doane *v.* Keating, 12 Leigh, 391; Barber *v.* Brace, 3 Conn. 9. In Gillett *v.* Ellis, 11 Ill. 579, it was held that goods on the deck of a propeller did not come within this rule. The court said, speaking of propellers: "They are double deckers with two holds. By the general custom prevailing in reference to them, goods stowed on the main deck,

master places the goods on deck without the knowledge and consent of their owner, and then throws them over to escape from peril, the shipper has no claim for contribution, but may claim the whole loss from the ship, as resulting from the wrong doing of the master.[1] If the goods are so placed with the consent of the shipper, this gives him no claim for contribution on the rest of the cargo, because it was an injury or increase of peril to that, which the shippers of that part cannot be presumed to have agreed to,[2] and it would seem that it does not give him a claim for contribution, on the ship.[3] If the goods are carried on deck in conformity with an established and known usage, or if the shipper pays full freight for them, the question

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or upper hold, are regarded as under hatches, and as safe as those stowed in the lower hold, or where the cargo in ordinary vessels is only considered as under cover. The master is allowed by this general custom to stow the cargo either in the hold, or on the main deck, at his convenience. No distinction is made in the price of transportation by the carrier, or in the rates of insurance by the underwriter. The cargo below and between decks is put on the same footing. This universal usage resulting from the character of the vessel must govern the rights and liabilities of the owners of the vessel and cargo. The owner of goods, which are stowed on the main deck of a propeller and necessarily cast overboard by the direction of the master, to preserve the vessel and crew, is therefore entitled to the benefit of a general average, as much as the owner of goods, that are stowed in the hold, would be under like circumstances."

[1] See ante, p. 186, n. 1.

[2] See ante, p. 185, n. 5.

[3] In Gould *v.* Oliver, 4 Bing. N. C. 134, *Tindal*, C. J., said: "Now, where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master for a wrongful loading of the goods on deck can exist. . . . . Unless, therefore, the owner of the timber in this case, has a claim for contribution against the owner of the ship, he is without any remedy whatever against any one, but must himself bear the whole of the loss in consequence of his timber having been thrown overboard for the benefit of all; an inference directly at variance with the general rule above laid down, and, indeed, contrary to the authority of the foreign writers." This language is susceptible of two meanings; either, that the owner of goods shipped on deck with his consent, and jettisoned, has a claim for an average contribution against the owner of the ship, though not against the other shippers; or the words, "*in this case*," may refer to the case before the court, in which the only question involved was, whether the shipper could claim contribution in case the ship-owner loaded the goods on deck under a privilege reserved to him by the general usage and practice of the voyage. This latter view is favored by the fact, that immediately after stating that the inference, that the owner of the goods was without a remedy, was contrary to the authority of the foreign writers, he cites Valin to the effect that the general rule relating to goods on deck does not apply to boats and other small vessels going from port to port, "where the usage is to load merchandise on the deck." If, however, the first construction be correct, it is not supported by any case in England, and is certainly opposed to numerous decisions in this country. See Lawrence *v.* Minturn, 17 How. 100, and other cases cited, p. 185, n. 5.

may be more difficult, and is not, perhaps, positively settled by authority. We should say, however, even then, that a jettison gave no claim on the cargo below deck, on the ground that the law-merchant would not give this sanction to a procedure which it deems very dangerous and objectionable. But the usage would probably have the effect of giving him a claim upon the ship.[1]

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[1] It was held in an early case in this country, Brown *v.* Cornwell, 1 Root, 60, decided in 1773, that where horses shipped on deck were thrown overboard for the safety of the ship and cargo, the owner of the horses was entitled to a general average contribution, it being the universal custom to ship horses in that way. This case has not been followed by any subsequent authority in this country. Dodge *v.* Bartol, 5 Greenl. 286; Cram *v.* Aiken, 13 Maine, 229; Sproat *v.* Donnell, 26 Maine, 185; Barber *v.* Brace, 3 Conn. 9; Hampton *v.* Brig Thaddeus, 4 Mart. La. 582. In the case of the Taunton Copper Co. *v.* Merchants Ins. Co. 22 Pick. 108, the question arose whether underwriters were liable for copper stowed on deck in conformity with a usage, the policy being "on property (copper or zinc) on board any vessel or vessels," between given dates. It was proved that a usage had existed for forty years to carry goods on deck which were not liable to be injured by dampness, and that copper and zinc were of this class. Mr. Justice *Putnam*, in delivering the opinion of the court, said: "The general rule seems to be well established. The plaintiff must show that his case comes within the exception, or, in other words, that the defendants have assumed the risk of the goods on deck. They prove that it is usual to carry goods on deck, but fail to prove that underwriters have ever paid for them, unless there was an express undertaking, or one by necessary implication. The former is not suggested, and it seems clear, that no inference could have been drawn from the nature of the goods which were named to subject the defendants, by implication, to any other risk than is assumed upon property generally, or ordinary goods." Mr. Phillips, in his valuable work on Insurance, vol. 1, § 460, remarks that the decision that a usage to pay for the goods when carried, as well as a usage to carry them, must be proved, "is quite a questionable form of presenting the rule." In Da Costa *v.* Edmunds, 4 Camp. 142, insurance was effected "on forty carboys of vitriol." They were shipped on deck, and during the voyage were thrown overboard for the safety of the ship. It was proved that they were frequently carried on deck, but that it was also usual to stow them below. It was contended for the underwriters that they were not liable because no notice had been given them of the manner in which the carboys were to be carried, but Lord *Ellenborough* held that if there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it, without any communication. The jury found for the plaintiff. See also the same case in *Banc.* 2 Chitt. 227. The point next arose in England in a case between a shipper and ship-owner. Gould *v.* Oliver, 4 Bing. N. C. 134. The action was against the ship-owner to recover damages for a loss arising from improper stowage, and also a general average loss for goods belonging to the plaintiff which had been shipped on deck on a voyage from Quebec to London. The second count set forth a custom that the owners of ships trading between Quebec and London, had a right of loading on the decks of their vessel a portion of the timber which they were employed to carry. The plea admitted the usage to carry timber in the manner mentioned, but denied that any custom existed to

The owners of a vessel who collect the contributory shares are entitled to a commission of two and one half per cent.[1]

SECTION III.

OF SOME EXPENSES OR CHARGES USUALLY SETTLED AS GENERAL AVERAGE.

There are some losses or expenses which are always settled in the same way as a general average loss, and are usually called by that name for convenience, although they do not fall precisely within any definition of it. Salvage is the principal one of these. We shall see that this word has two meanings. It is

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pay a general average contribution upon timber so laden and jettisoned. To this plea the plaintiff demurred and issue was joined on the demurrer. The court held that the plaintiff was entitled to recover. This case was supposed by the court in Taunton Copper Co. *v.* Merch. Ins. Co., *ut supra*, to go only to the extent of holding that the owner of the ship was liable, in such a case, to contribute, and not the owners of the cargo; but it appears from a report of the same case at a further stage of proceedings, that all the cargo was owned by the plaintiffs, and the question therefore did not arise. Gould *v.* Oliver, 2 Man. & G. 208, 2 Scott, N. R. 241. In Hurley *v.* Milward, 1 Jones & Carey, Irish Exch. 224, an action was brought against the owners of a vessel for a general average contribution for the loss of certain pigs, which were shipped on deck, on a voyage from Waterford to London, and were jettisoned for the safety of the vessel. Judgment being given for the plaintiff, the ship-owners sued their underwriters for the amount thus paid by them, and, after an elaborate argument before the court of Queen's Bench, it was held that as the carrying of the pigs on deck was justified by the usage of the trade, the underwriters were responsible. Milward *v.* Hibbert, 3 Q. B. 120. Valin, also, in his commentary on the Ordinance of Louis XIV. liv. 3, tit. 8, art. 13, remarks, upon the rule there laid down, that "this disposition does not apply to small vessels going from port to port, where a usage exists of stowing their lading as well above as under deck." See also the learned note of Sergeant Shee, upon this subject, Abbott on Shipping, p. 481.

[1] Barnard *v.* Adams, 10 How. 270, 308; Sturgis *v.* Cary, 2 Curtis, C. C. 382. The language of the court, in Barnard *v.* Adams, would imply that the right to charge this commission rested on the custom of average brokers; but in Sturgis *v.* Cary, Mr. Justice *Curtis* stated that he had obtained a copy of the record in that case and found that no evidence of any usage was offered, and that the presiding judge instructed the jury, as matter of law, that the charge was correct, which ruling, being excepted to, was sustained by the Supreme Court. He accordingly held, that a usage in the city of Boston not to allow such charge, was not admissible to contravene the general rule of the law-merchant.

sometimes used to indicate what is saved from a wreck; but in this sense we do not refer to it now. The word more frequently means the amount that is paid to those who save maritime property which is endangered or abandoned; and such persons are called, in maritime law, salvors. This amount is usually decreed in admiralty in the form of a percentage on all the property saved. Sometimes, however, it is a gross sum given to the salvors. In either case it is settled in the same manner as a general average claim, and usually under that name.[1] Wherever any expenses or advances are to be contributed for, we suppose that the common rules of law in regard to interest would determine whether it should be charged.[2]

On the other hand, damage by collision, which is a frequent sea peril, is not settled as an average loss,[3] but according to principles stated elsewhere.[4] It should, however, be said, that a collision may give rise to expenses for the common benefit, in the delay or deviation necessary for repair, or otherwise, and, in this country at least, such expenses would be averaged.[5]

Bills of lading often contain a clause requiring payment, in addition to freight, of "primage and average accustomed." This means a kind of composition established by usage for

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[1] Heyliger *v.* N. Y. Firemen Ins. Co. 11 Johns. 85; Stevens & Benecke on Av. (Phil. ed.), 141, note. In Peters *v.* Warren Ins. Co. 1 Story, 463, 468, Mr. Justice *Story* stated the law as follows: "General average is commonly understood to arise from some voluntary act done, or sacrifice, or expense incurred, for the benefit of all concerned in the voyage or adventure; and then it is apportioned upon all the interests which partake of the benefit. But the mere fact, that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done, or sacrifice, or expense voluntarily incurred, for the common benefit, does not make it necessarily a case of general average by our law. Salvage is properly a charge, apportionable upon all the interests and property at risk in the voyage, which derive any benefit therefrom. But, although it is often in the nature of a general average, it is far from being universally true, that, in the sense of our law, all salvage charges are to be deemed a general average. On the contrary, these charges are sometimes a simple average, or partial loss. We must, therefore, look to the particular circumstances of the case to ascertain, whether it be the one or the other."

[2] See Shelton *v.* Brig Mary, 6 Law Reporter, 75, and the remarks of Mr. Justice *Story* in Peters *v.* Warren Ins. Co. 1 Story, 463, 468.

[3] Peters *v.* Warren Ins. Co. 3 Sumner, 389; Emerigon, ch. 12, s. 14, note 1 (Meredith's ed.), p. 328.

[4] See ante, ch. 7, § 6, on Collision, p. 187–211.

[5] Peters *v.* Warren Ins. Co. 3 Sumner, 389, 392.

sundry small charges, which were formerly assessed by way of average; such as port charges, pilotage, and the like.[1] And there are still sundry small charges usually or frequently assessed as average, and of course paid for by contribution; but in regard to many of them there is probably no established usage or rule of law. The principal of these are towage,[2] light money, dockage, and wharfage,[3] hire of anchors, cables, or boats for temporary purposes, or of persons to guard the ship, quarantine expenses, cutting a way through ice, and similar charges.

SECTION IV.

THAT THE SACRIFICE MUST BE JUSTIFIED BY A NECESSITY.

We will now consider the second essential of general average; which is, that the loss or sacrifice must be necessary, or justified by a reasonable probability of its necessity and utility. Cases involving this question are very rare, but the reason of the rule is perfectly obvious; for such a sacrifice without a necessity, real or apparent, is simply a foolish or wicked destruction of property, which he who causes it must respond for, and which cannot give the suffering party any claim upon any other party, whom it neither benefited nor was likely to benefit.[4]

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[1] See post, ch. 11, § 1.

[2] Lyon *v.* Alvord, 18 Conn. 66.

[3] See Wightman *v.* Macadam, 2 Brev. 230.

[4] The Gratitudine, 3 Rob. Adm. 240, 258. Mr. Justice *Curtis*, in Lawrence *v.* Minturn, 17 How. 100, 110, speaking of the necessity which would authorize the master to make a jettison, said: "If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person, to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority." On the other hand, there is a *dictum* by *Coulter*, J., in Myers *v.* Baymore, 10 Barr, 114, 118, to the effect that if the goods are thrown overboard unnecessarily by the master, although he acts with the most honest intention to save the vessel, there is no claim for general average. Although this is the law relative to the power of the master to sell the vessel, we should doubt its applicability to the

In former times the law-merchant guarded with much care against wanton or unnecessary loss of this kind; particularly by requiring that the master should formally consult his officers and crew and obtain their consent before making a jettison of the cargo.[1] But the rule has passed away, and the practice is almost unknown.[2] An inquiry into this change, so far as it is grounded upon a change in the character of sailors, or in the view which the law-merchant takes of them, might not be without its interest; but this is not the place for it. It is now universally conceded that the interests of commerce require a plenary authority on the part of the master, who would seldom think of consulting his crew in any emergency, and is not required by law to do it. Our statutes speak in some cases, as will be seen in a later chapter,[3] of a joint action of the crew and the officers of a ship, but even this seldom occurs in fact.

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case of a jettison. In Lawrence *v.* Minturn, *supra*, the vessel had met with a gale and was severely strained by the weight of the deck load. After the gale abated, and when the sea was calm and the vessel in no immediate danger, the master, officers, and crew made a protest, setting forth the above facts and asserting that the deck load was unsafe, and that it should be thrown over as soon as possible. This was accordingly done. It appeared that the goods were of such a nature that they could not be thrown overboard, without the greatest risk, when there was any considerable sea. It was held, that the jettison was justifiable. The court said: "Precaution against dangers, which are certain to occur, is surely proper. That they must experience gales and heavy seas at that season, in that voyage, was so nearly certain, that it was not unreasonable to act on the assumption that they would occur, and prepare the ship to encounter them while in a smooth sea, when alone they could do so." In Bentley *v.* Bustard, 16 B. Mon. 643, it was held, that if a boat runs on a known obstruction, or upon the shore, without being driven on by the violence of the wind or the force of the current, and the running on could have been prevented by proper care and skill, a jettison will not be justified, although, the boat being on, it is the only way of getting her off, but the owners of the boat are liable for the value of the goods thus thrown overboard. So if the unseaworthiness of the vessel at the time of sailing on the voyage caused, or contributed to produce, the necessity for the jettison, the loss is not within the exception of the perils of the seas, and the vessel is liable for the whole value of the goods thrown overboard. Dupont de Nemours *v.* Vance, 19 How. 162, 166. See also, Lawrence *v.* Minturn, 17 How. 100, 110; Chamberlain *v.* Reed, 13 Maine, 357.

[1] See authorities cited in Emerigon, ch. xii. sect. xl. (Meredith's ed.), p. 469, 470; and in The Nimrod, Ware, 9.

[2] Birkley *v.* Presgrave, 1 East, 220, 228; Sims *v.* Gurney, 4 Binn. 513; Col. Ins. Co. *v.* Ashby, 13 Pet. 331, 343; Nimick *v.* Holmes, 25 Penn. State, 366, 372. It is the duty of the master to determine when it is necessary to sacrifice a portion of the cargo for the safety of the rest, and, as a general principle, the crew have no authority to make a jettison, without his orders. The Nimrod, Ware, 9, 15.

[3] See post, ch. 12, § 4.

Indeed, a consultation with the crew is now so wholly unusual, that if it took place it might be regarded as one of those circumstances of extra precaution, which suggest the probability of fraud.[1]

SECTION V.

THAT THE SACRIFICE MUST BE SUCCESSFUL.

The third essential is, that the sacrifice must be successful. The reason of this, also, is perfectly obvious. That which is not saved, is in no way benefited by the sacrifice, and, therefore, in no way under the implied obligation of compensating for it. The cases which raise this question are not numerous.[2] It is said, however, as a consequence of this rule, that where there is delay or deviation for repair, and the wages and provisions expended,[3] or the necessary expenses there incurred,[4] or the repairs,[5] would constitute a general average loss, they cannot have this

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[1] Emerigon (ch. xii. sect. xl., Meredith's ed., p. 469), cites a remark of Targa, to the effect that during the sixty years that he had been judge of the *Consulat de la Mer*, at Genoa, he had met with only four or five instances of *regular* jettison; and these were suspected of fraud, for the single reason that formalities had been too much attended to. When a consultation is had, it is merely evidence that the jettison was deliberately made, but it does not prove the necessity of it. Bentley *v.* Bustard, 16 B. Mon. 643, 695.

[2] Scudder *v.* Bradford, 14 Pick. 13; Bradhurst *v.* Col. Ins. Co., 9 Johns. 9; Gray *v.* Waln, 2 S. & R. 229, 255; Sims *v.* Gurney, 4 Binn. 513, 524. If the vessel is temporarily saved by the sacrifice it would seem that contribution is due, although the vessel is afterwards lost, but if the peril which rendered the sacrifice useless was the same peril which was the occasion of the sacrifice, the loss must rest where it falls, as where the masts, which were on fire at the time, were cut away with the expectation that they would fall overboard and thus save the ship and cargo, and a spar fell through the deck and set fire to the cargo, whereby both it and the ship were partially consumed. Lee *v.* Grinnell, 5 Duer, 400, 422.

[3] Williams *v.* Suffolk Ins. Co., 3 Sumner, 510, 513, 514.

[4] Nelson *v.* Belmont, 5 Duer, 310, 325. It was said, in this case, that where the expenses were incurred with a view to decide in regard to the resumption of the voyage, they might perhaps be a subject of contribution, and so, where the vessel had been scuttled to save the cargo from destruction by fire, if the cargo had been afterwards taken out in order that the water might be pumped out.

[5] Myers *v.* The Harriet, U. S. D. C., East. Dist. Penn., 2 Wharton's Dig. p. 48, tit. Ins. 140.

effect unless by means of the repair the ship is enabled to resume her voyage. For the whole ground on which contribution can be claimed for such expenses, is, that they were needed and effectual for enabling the ship to go herself and carry the cargo to the original destination; for on no other ground can it be said, that these expenses were intended for the common good, or resulted in the common benefit.

If, therefore, we suppose a case of capture, wrongful or otherwise, and the crew, or a part, rescue and bring off the ship, one of two results will follow. Either the voyage will be resumed at once, or after repair and refitting, and, perhaps, after a return home, and then the expense of all this may be averaged. Or else the voyage will be broken up and abandoned, and the ship, though she returns home, is under no favorable circumstances for resuming her voyage, and perhaps no possibility of doing so; and in this case no expenditure, occurring after the capture, can be averaged, for none of it was successful.[1]

If any portion of the cargo is rescued with the ship, and brought home to its owners, so far as this is concerned the rescue may be successful, and the cargo saved would be bound to contribute towards that part of the expense which was incurred for its benefit in common with that of the ship and freight. In reference to what constitutes a breaking up of the voyage, rendering its resumption impossible, and thus extinguishing all claim for general contribution, it has been held, that a sale of the ship by decree of court for salvage, is such breaking up of the voyage, rendering an abandonment of the same inevitable.[2] Sometimes, however, expenses are settled upon the principles of general average which more properly, perhaps, should be determined by the question of agency. In such a case contribution is made, though the voyage be afterwards broken up.[3]

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[1] Williams *v.* Suffolk Ins. Co., 3 Sumner, 510, 513, 514.

[2] Williams *v.* Suffolk Ins. Co. *supra.*

[3] Thus Mr. Stevens, in his work on General Average (Phillips' ed.), p. 74, says: "It will occur to every one in the habit of considering questions of this nature, that there is an essential difference between a claim for *Restitution* and one for *Recompense*. In the former case, e. g. in that of jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, there is no claim to replace that part which was jettisoned, — and the same if the *ship* be lost before the articles sacrificed were replaced. But in the case of expenses incurred with a view towards the general benefit, it is clear

SECTION VI.

WHEN THE THING SACRIFICED COULD NOT HAVE BEEN SAVED.

There is another class of cases which should be noticed; that where the very thing which is purposely destroyed in order to save other things, could not in any way be saved, but must have perished at all events. Here there is no claim for contribution; because, properly speaking, the thing was not destroyed, but only its destruction somewhat hastened. This principle is the same with that already stated as governing in the case of a voluntary stranding; which gives a claim only when there was a substantial chance of saving the ship. A good illustration of the rule is found in the case where a vessel, laden with lime, was hauled out into the stream and there scuttled because the lime was on fire. Here the lime was destroyed at once; but it must have perished, although much more slowly, if the ship had not been saved; and, therefore, the ship did not contribute towards the loss.[1] But generally where a cargo is on fire from

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that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port, or the ship-owner himself. The former is a case lying strictly within the adventure; for if a part be sacrificed, and the remainder be lost, the whole is lost. But in the latter case, the expenses are *extraneous*, and were incurred under an implied obligation of indemnity on all the parties, — which is one of the duties each of the parties who are joined in a sea adventure takes upon himself." See also, 2 Phillips on Ins. § 1319; Spafford *v.* Dodge, 14 Mass. 66, 77.

[1] Crockett *v.* Dodge, 3 Fairf. 190. This case proceeds entirely on the ground that the lime, at the time the vessel was scuttled, was worthless, and, therefore, does not differ from the principle, before laid down, that goods are to be contributed for only at the value they had at the time of the sacrifice. Nickerson *v.* Tyson, 8 Mass. 467. See, however, the remarks of Mr. Justice *Story*, in Col. Ins. Co. *v.* Ashby, 13 Pet. 331, 340. In Marshall *v.* Garner, 6 Barb. 394, a claim was made for contribution for masts, which had been cut away. At the time they were sacrificed, the ship was on a beach in four feet of water, while she drew fifteen. She was on her broadside, where she lay on her bilge. If the masts had not been cut away, the ship and cargo would have been lost, and all on board would have perished. As soon as the masts were cut away the vessel righted, and the cargo was saved. It was held, that there could be no contribution, because, at the time the masts were cut, their destruction, from already existing causes, was only anticipated, and that nothing, therefore, was sacrificed. This question was discussed at great length in the recent case of Lee *v.* Grinnell, 5 Duer, 400.

an accidental cause, and the vessel is scuttled, or water is poured down to extinguish the fire, and goods are thereby injured which the fire had not reached, they are to be contributed for.[1]

A somewhat similar question has arisen, when not that precise thing, but that or some other must be lost, which has been supposed to present some difficulty, but which, as it seems to us, is open to a direct and certain answer. Benecke, a high authority for the most part, says: "If the master's situation were such, that but for a voluntary destruction of a part of the vessel, or her furniture, the whole would certainly and unavoidably have been lost, he could not claim a restitution, because a thing cannot be said to have been sacrificed, which had already ceased to be of any value."[2] A rule like this, would exclude from average precisely those cases to which it is most frequently applied, and concerning which no doubt has ever arisen.

Suppose a ship is on a reef; if not lightened, her destruction and that of the cargo, are perfectly inevitable; but if lightened she may be got off; some of her cargo is thrown over, and she is got off, and the ship and the rest of the cargo saved. We know that the law-merchant has given contribution here for some three thousand years. Or, suppose a ship anchored in a tempest off a lee shore; she drags her anchors, and must inevitably be wrecked and lost with her cargo unless the force of the wind upon her is lessened; accordingly her masts are cut away, and they with all her top-hamper are cast overboard and lost; and then she is able to ride out the gale in safety. Could any one doubt that this would be an average loss? This theory or principle of Benecke's rests upon a mere mistake or misstatement. It is true and generally admitted, that if a thing is destroyed for

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The rigging and upper spars of the vessel, which was lying at a wharf, were on fire. The firemen refused to work on board or near the ship for fear of the blocks, and other articles, which were on fire aloft, falling on them. For the purpose of saving the ship and cargo the masts were cut away. Assuming that the purpose was accomplished, the court were divided on the question whether the masts were to be contributed for, Mr. Justice *Duer* holding, that they were not, Mr. Justice *Hoffman* being of a contrary opinion, and Mr. Justice *Campbell* declining to express his views upon the subject.

[1] Nelson *v.* Belmont, 5 Duer, 310, 323; Lee *v.* Grinnell, 5 Duer, 400. In Nimick *v.* Holmes, 25 Penn. State, 366, the distinction between the goods already on fire and the rest of the cargo was not noticed, and it was held that all which were damaged by water were to be contributed for.

[2] Stevens & Benecke on Average, Phil. ed. 110.

the benefit of others, which thing could not possibly have been saved, it is no sacrifice, and not an average loss. But it is also true, that if there be a number of things together, all of which must perish unless some one of them is voluntarily destroyed, none of them are exposed to inevitable destruction. Each has the chance or certainty of escape if it can prevail on another to perish; and this is precisely the ground of general average. It is as if all must be lost, — say by capture, — unless a certain sum be paid.

It would be absurd to say all must be lost, and therefore if the sum be paid they shall not repay it; because all need not be lost provided that sum be paid. If instead of paying a sum of money, the voluntary surrender of a part of the property would have the same effect, this would, on the one hand, be the same thing in principle as the redemption by payment of money; and on the other, it would be, in principle, the very case which Benecke's rule would exclude from average. It is true that in words he confines his rule to the ship and her appurtenances, but if it rests on any principle whatever, that must apply equally to all property saved from a common risk by a sacrifice of part.

SECTION VII.

WHETHER THE PROPERTY IN PERIL AND RESCUED MUST BE SAVED BY THE SACRIFICE.

Still another question has arisen which should be considered under this head, of the necessity that the sacrifice should be effectual, in order to become an average loss. This question is, if there be a sacrifice for other property, and that other property is saved, must it also appear that it was saved *by the sacrifice*, or, in other words, would have been lost without it, in order to entitle the owner of the property sacrificed to contribution. For example, we will suppose a vessel anchored as before, and dragging her anchors, and the masts are cut away, and then a sudden change of wind occurs and it blows off shore instead of on, so that the hull and cargo are safe. Shall the cargo now con-

tribute for the loss? This question is more difficult than that we have just considered, and the authorities in relation to it are not quite uniform.

Upon the whole we think, however, that the weight of reason agrees with what seems to us the weight of authority, that if there be a voluntary sacrifice, made for good cause, and with a reasonable prospect of saving thereby other property which would otherwise be lost, and this other property is saved in fact, it must contribute to the loss, whether it was saved by that or by other means. One reason for this is, that the law-merchant avoids intricate questions if it can, and prefers to settle them by a general rule, which shall on the whole work justice; and it must be difficult, if not impossible, in most of these cases, to draw the line, and say that up to this point the agency and utility of the sacrifice continued, and here other causes of safety began to operate; or to decide that measures rationally and honestly resorted to for the purpose of safety, and followed by it, had no agency whatever in causing that safety.

Another reason is, that if a voluntary sacrifice of some property for other property is made in good faith and for good reason, an important part of the moral foundation for the claim for contribution exists, although the other part, that the property was in fact saved by that sacrifice, may not exist.[1]

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[1] In Scudder *v.* Bradford, 14 Pick. 13, a vessel was dragging her anchors, and drifting towards shore. Her masts were cut away, and she was thereby brought up. An hour afterwards she went on shore. It was held that the masts were not to be contributed for because the property was not rescued from the peril by their destruction. This is in accordance with the 9th article of the 22d Tit. of the Hamburgh Insurance Law. See also, Ord. de la Mar. tit. du jet. art. 15; Code de Commerce, art. 423. In Benecke & Stevens on Average, by Phillips, pp. 100, 105–107, it is strongly contended that this rule is contrary to the principles and policy of general average, on the ground that no one has the right to attempt the preservation of the whole at the risk of an individual. Mr. Phillips, in a note on page 107, says: "The doctrine of the American cases agrees with that laid down in England, namely, that to entitle the parts to contribution for a sacrifice by jettison, the impending peril must be avoided. But the reasons given by Mr. Benecke in opposition to this doctrine, are certainly very forcible, and to my mind conclusive."

SECTION VIII.

OF CONTRIBUTION FOR A GENERAL AVERAGE LOSS.

We proceed now to consider the question, what property contributes, and on what principle contribution is made, in a case of an ascertained general average loss.

The rule, in the first place, is, that all the interests for which the sacrifice is made, and which are actually saved, contribute, and none other. If property be saved for a time, by a sacrifice, jettison for example, which lightens a stranded ship so that she gets off and pursues her voyage, and afterwards, before reaching her port, another disaster destroys one half of the goods saved from the former peril, it is this half only which is finally saved that contributes.[1]

Maritime interests may all be ranged under one or other of these divisions, the ship, the cargo, and the freight.

In regard to the contributory value of the ship there has been much difficulty, and there is not now any uniformity of practice. The ancient codes prescribed certain rules which have long since fallen into disuse.[2] The principle which may now be considered as universally adopted, is this; the ship shall contribute for the whole of the value which it had at the time to which the apportionment refers.[3] For some purposes this is held to mean the time of the loss;[4] but, as a general rule, we think not only that the contributory interests are those which are saved, but that the contributory value must be their value when saved, and this must be their value when they arrive safely in port.[5]

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[1] Gray *v.* Waln, 2 S. & R. 229, 255, per *Tilghman*, C. J.; Dig. 14, 2, 4, 1; Boulay Paty tome iv. p. 443.

[2] These are collected by Mr. Stevens in his valuable essay on General Average. See Stevens & Benecke on Av., Phil. ed. p. 211.

[3] Clark *v.* United F. & Mar. Ins. Co. 7 Mass. 365; Simonds *v.* White, 2 B. & C. 805.

[4] Douglas *v.* Moody, 9 Mass. 548; Mutual Safety Ins. Co. *v.* Cargo of the Ship George, Olcott, Adm. 157.

[5] In Simonds *v.* White, 2 B. & C. 805, *Abbott*, C. J., said: "But in one point all" (nations) "agree; namely, the place at which the average shall be adjusted, which is

But there is much difficulty in applying this principle. Even if the value of the ship when she sailed can be ascertained, this is seldom the very same, and may be widely different from, her value at the time of the loss. There has been already some disposition in some of our states to adopt one of those rules, of which the law-merchant has many, which seem to be arbitrary, but which are in fact founded upon the average of cases, and work well on the whole, although specially adapted to none; and by this rule one fifth of her value when she sailed is deducted.[1] It would seem, however, that even in these states, this rule is not applied when the value can be ascertained more exactly. So, too, where there is an actual sale of the ship, this has been taken as fixing her contributory value.[2] In most cases it would do so with sufficient accuracy; but it is obvious that the price might be affected, in either way, by extraneous circumstances, so as not to be an adequate measure of her value. On the whole, in the present state of the law, we cannot perhaps say more, than that the principle above stated should be applied by ascertaining the value of the ship at that time, by the best evidence obtainable.[3] The value, as given in a policy of insurance on the ship, is not to be taken if that value is incorrect.[4]

One remark may be made as to all contributory values. It is, that the amount to be paid on account of any interest, by way of contribution for any subsequent averages, or for any expenses

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the place of the ship's destination, or delivery of her cargo." See also, Gillett *v.* Ellis, 11 Ill. 579.

[1] Leavenworth *v.* Delafield, 1 Caines, 573; Gray *v.* Waln, 2 S. & R. 229. This rule has not been adopted in Massachusetts. Spafford *v.* Dodge, 14 Mass. 66; Douglas *v.* Moody, 9 Mass. 548.

[2] Bell *v.* Smith, 2 Johns. 98; Lee *v.* Grinnell, 5 Duer, 400, 429. But see Mutual Safety Ins. Co. *v.* Cargo of the Ship George, *infra*.

[3] In Mutual Safety Ins. Co. *v.* Cargo of the Ship George, Olcott, Adm. 157, where this whole subject was considered at great length, the court held that the value of the ship at the port of departure was to be taken, making a reasonable allowance for wear and tear, and that this deteriorated value must be proved by evidence. *Betts*, J., said: "There would manifestly be great convenience in possessing a criterion which should infallibly fix that amount; but without the support of notorious usage and custom to an uniform scale of depreciation of a vessel by performing the whole or any portion of her voyage, it must be sheer conjecture with the court to pronounce that the abatement of one fifth, or one half, or any other aliquot of the value of the ship when sound, a reasonable measure of its worth at the time of loss."

[4] Meeker *v.* Klemm, 11 La. Ann. 104. See Mutual Safety Ins. Co. *v.* Cargo of Ship George, *supra*.

which are necessary for the ultimate safety of the property, must first be deducted, because just so much has not been finally saved, and may be considered as lost by the loss for which contribution is made.[1]

Then, as to the contributory value of the cargo. If the goods lost were such, that if not sacrificed, they would certainly have arrived in a damaged state and with diminished value; this diminished value shall be taken as that for which contribution is made. But this is true only where such diminution in value is certain; where there is only a possibility, or a mere probability of it, the value at the time of the loss is to be taken.[2]

Goods on deck, although not to be contributed for, must themselves contribute, if saved by an average loss.[3]

If goods are jettisoned, and afterwards recovered, not their whole value, but only so much thereof as is lost by the jettison and damage thence arising, added to the expense of recovering them, is to be contributed for.[4] It may be added, that goods jettisoned still belong to the owner, and a finder of them acquires no title, except a lien on them for the salvage which may be decreed in admiralty.[5]

It was held by Magens,[6] on what authority we know not, but probably on the practice of his day, that goods which pay no freight, should not pay average. But these things are perfectly distinct, and it is generally said now that there is no such rule, nor any reason for it. It is probable, however, that it means no more than that the clothes, ornaments, and travelling baggage of passengers should not be required to contribute; nor are they in practice at this day.[7] But there seems to be no good reason,

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[1] See ante, p. 320, note 1.

[2] See Rogers *v.* Mechanics Ins. Co., 1 Story, 603, 609; Stevens & Benecke on Av. (Phil. ed.), 235, note (a).

[3] Stevens & Benecke on Av. (Phil. ed.), 210, 248.

[4] The Ordinance, art. 22, tit. *Du jet.*, says: "If the effects jettisoned are recovered by the owners after contribution, they shall be bound to return to the master and those interested, what they have received in the contribution, less the damage still remaining to them from the jettison and the expenses of the recovery." See also, Pothier on Maritime Contracts, n. 136, Cushing's ed. 78; Molloy, book ii. ch. vi. § xvi.

[5] Dig. 14, 2, 2, 8, and 14, 2, 8; Emerig. ch. xii. § xl.; Molloy, book ii. ch. vi. § xvi. In Tucker *v.* Cappes, 2 Rolle, 497, 498, Mr. Justice *Dodridge* said that the owner of the goods might bring trover against the finder of them.

[6] Vol. I. p. 62, s. 56.

[7] 1 Magens, p. 62, 63. By the Roman law all the goods on board, including the

founded on principle, for excusing them. And Emerigon, who thinks they should not be excused, gives for his opinion the strong reason, that if travellers' trunks, containing just these things, are jettisoned for the common safety, they are always contributed for.[1]

The books raise a question which has not occurred in practice, whether goods of great value, as jewels, for example, are to be contributed for at their full value, if jettisoned in ignorance of their value. We should say that merely this ignorance can make no difference; but if they were cast over because of this ignorance, and could have been, and would have been saved had their value been known, and there was any thing in the usage of merchants, or in the nature of the goods, which made it a duty on the part of the shipper to declare what they were, and especially if the concealment were in any way fraudulent on his part, their full value should not be contributed for. In such case, that which seems to have been the ancient rule might be applied; which was, only the value which the master might well suppose the goods to have, should be contributed for.[2]

Jewels and bullion always contribute if saved, however small their bulk, in proportion to their value.[3] So we think should bank-notes; unless it were plain that they could not have been lost in fact, because sufficient precaution had been taken to identify them, so as to recover their value if lost by wreck.[4]

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baggage, wearing apparel, rings, etc., were made liable to contribute. Dig. 14, 2, 2, 2. See also, 2 Molloy, ch. vi. § 14. Both in England and this country the practice is as stated in the text. See Abbott on Shipping, 503; Stevens & Benecke on Av. (Phil. ed.), p. 206, 251; 2 Phil. on Ins. § 1394.

[1] Ch. xii. sect. xlii. (Meredith's ed.), p. 495.

[2] See 2 Molloy, ch. vi. § 16; Park on Ins. ch. vii. p. 176; Ordonnance de Wisbuy, art. 41, 43; Cleirac, p. 44; Emerigon, ch. xii. § xlii. (Meredith's ed.), p. 497; 1 Magens, 63.

[3] Bevan *v.* Bank of the United States, 4 Whart. 301; Nelson *v.* Belmont, 5 Duer, 310; Dig. 14, 2, 2, 2; 1 Magens, p. 62; Park on Ins. p. 175; Peters *v.* Milligan, before Mr. Justice *Buller*, id. 178; Millar on Ins. 344, 345. Lord Kames, in his work on the "Principles of Equity," p. 116, admits this to be the rule, but contraverts its propriety. See also, Weskett on Ins. p. 130, 131.

[4] Weskett, tit. Contribution, n. 15, citing 2 Valin's Com. 200, classes bills with money, jewels, etc., as articles that ought to contribute, but Mr. Phillips very justly remarks, that "these are not so properly actual property, to the amount promised to be paid, as the evidence of demands, which evidence may be supplied by other, in case of their being lost, if sufficient precautions are taken by the holder to prove what particular notes they were, this circumstance sufficiently distinguishes them from specie or

But we doubt whether the mere fact that a holder might take such precautions, should, of itself, exempt them from contribution. Government property was once considered as exempt from contribution,[1] but never, we think, in England, and certainly not now, either there or here.[2] It would seem that provisions, unless they form a part of the cargo, are put on board for consumption, and are exempt from contribution.[3]

Formerly, slaves were contributed for according to their value;[4] but it is believed that no court would now sanction the jettison of them as merchandise.[5] At the same time, if saved as property, there might be reasons for requiring them to contribute; and this has been so held.[6] Neither passengers nor crew are called on to contribute for their personal safety.[7] Nor

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other property, which is usually made to contribute." 2 Phil. on Ins. § 1397. It was held, in the case of The Emblem, Daveis, 61, that bills of exchange, saved from a wreck were not liable for salvage. And it would, therefore, follow that they would not be bound to contribute in general average.

[1] 1 Magens, 172; Us et Coustumes de la Mer, 20; Jug. d'Oleron, c. 8, n. 8; Valin, tom. II. p. 184, tit. Des Av. a. 11, n., thinks there is no reason for this exception.

[2] See Brown *v.* Stapyleton, 4 Bing. 119; United States *v.* Wilder, 3 Sumner, 308.

[3] Emerigon, ch. xii. s. xlii. Meredith's ed. p. 493; Molloy, book 2, ch. vi. § xiv. In Brown *v.* Stapyleton, 4 Bing. 119, a claim was made by the owner of a merchant ship for contribution by provisions, which were shipped by the English government for the support of convicts, who were being transported. It was held that the claim could not be maintained, on the ground that provisions for the crew and passengers were not liable to contribute in any case. Mr. Phillips, in his Treatise on Insurance, vol. 2, § 1399, doubts the correctness of this decision. He says there is a plain distinction between a case where provisions are supplied by the ship-owner for the crew or for the passengers, and one where they are furnished by a shipper, to be consumed by passengers or animals transported for him. Because, in the former case the value of the provisions reappears in the freight, and by this, contribution is made.

[4] Dig. 14, 2, 2, 2. Emerigon, ch. xii. sect. xlii. § 9, Meredith's ed. p. 497, says: "Slaves being considered as chattels, it follows that the value of negroes on board a trading vessel is subject to contribution: *Res contributionem debent, in quibus et servi servati numerantur.* But I do not think there would be a title to demand contribution for a negro accompanying his master in the capacity of domestic servant. Such a one is the faithful friend and companion of his owner."

[5] Mr. Cushing, in his valuable note to Pothier on Maritime Contracts, p. 147, says: "It was formerly a question whether negro slaves might be thrown overboard to lighten the ship; but there is no doubt that such an act would now be considered homicide. The civil law accounted slaves *things;* but it never went so far as to comprehend them under the general term *merchandise.*" See also, Emerigon, ch. xii. sect. xl. § 5, Meredith's ed. p. 472.

[6] Barelli *v.* Hagan, 13 La. 580; Hunter *v.* Gen. Mut. Ins. Co. of N. Y., 11 La. Ann. 139.

[7] Dig. 14, 2, 2, 2; Guidon, ch. v. art. 26; Cleirac, p. 45; Emerigon, ch. xii. sect.

do the wages of mariners contribute;[1] an exception in the books, of the case of the ransom from a pirate,[2] has no foundation in practice, and as little, we think, in reason.

As only the property endangered can be said to be saved by the sacrifice, only that is called on to contribute. And if the average loss is only an expense incurred, so much of this expense as was incurred for an especial object or interest, without benefiting the rest, is to be borne by or charged to that interest alone.[3]

The reason for these rules would extend to the case of goods which had been involved in a common peril, but had been separated and placed in safety, and afterwards a sacrifice made or expenses incurred for the safety of what was left behind. We must here, however, distinguish between cases which might easily be confounded. No one would say, that if a cargo were gradually saved, parcel by parcel, by continuous efforts, causing a continuous expense, that each parcel should be marked, and required to contribute only for the expense incurred about it, or before its separation. And, although there might be some considerable lapse of time between the delivery and safety of different parts of the cargo, if it could fairly, or even by a liberal construction, be considered that all were involved in a common peril, and all were saved at different times and in different ways, by efforts or expenses which consisted indeed of separable parts, but of which the parts were so connected as to form a whole, in that case they should all contribute.[4]

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xlii. § 8, Meredith's ed. 495; Brown *v.* Stapyleton, 4 Bing. 119; Weston *v.* Train, 2 Curtis, C. C. 49, 59.

[1] Pothier on Maritime Contracts, Cushing's ed., p. 72, n. 126; Emerigon, ch. xii. sect. xlii. § 7, Meredith's ed. 494; Consolato del Mare, c. 281, 293.

[2] See Pothier and Emerigon, as cited above.

[3] In Peters *v.* Warren Ins. Co., 1 Story, 464, 469, Mr. Justice *Story* said: "If the expenses are incurred for the benefit of all concerned, they are a general average. But if there should be a capture of a neutral ship, solely on account of the cargo, which is owned by different persons, who are shippers, if no proceedings are had against the ship, but are against the cargo only, the expenses occasioned thereby will be apportioned upon the owners of the cargo, and are but a partial loss thereof, and not a general average; for such expenses are not for the benefit of the ship or freight, which, therefore, do not contribute thereto."

[4] Bevan *v.* The Bank of the United States, 4 Whart. 301. In this case a quantity of specie, the property of the defendants, was shipped, together with other goods, on a

Some questions have been raised as to the manner in which the contributory value of the goods sold, should be estimated. There is not, perhaps, a uniformity of practice on this point. We should say, however, that a convenient and reasonable rule, which has much practice to recommend it, is, to take the net proceeds of the goods at the place of adjustment if actually sold

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voyage from New Orleans to Philadelphia. The vessel became ice-bound in Delaware bay, and was in imminent danger of being wrecked. The specie was taken out and conveyed by land to Philadelphia, where it was delivered to the defendants on payment of freight. Eight weeks afterwards the vessel arrived in safety with the remainder of her cargo, which had been in whole or in part discharged into lighters, and afterwards reshipped. A number of additional charges had also been incurred in the mean time for the safety of the ship and cargo. It was held, that the defendants were bound to pay their proportion of these expenses. 'In Bedford Com. Ins. Co. *v.* Parker, 2 Pick. 1, the ship was stranded a few miles from her port of destination. The owner of the cargo saved part of it at his own expense. Subsequently the insurers on the ship entered into a contract with a certain party to pay him $2,600 if he would get the ship off. The ship was saved and brought to the wharf, with part of the iron on board. It was held, that only this part was liable to contribute in general average for the expense thus caused. Similar decisions in relation to stranded ships were given in Sparks *v.* Kittredge, U. S. D. C., Mass., 9 Law Reporter, 318; Job *v.* Langton, 6 Ellis & B. 779, 37 Eng. L. & Eq. 178. It is difficult to reconcile these cases. The facts in each are not materially different. Mr. Phillips (vol. 2, § 1407) doubts the correctness of the decision first mentioned, and in this conflict of authorities, it is impossible to determine with accuracy what the law is. The question has also arisen in a recent case in New York, Nelson *v.* Belmont, 5 Duer, 310. A ship, loaded with cotton, was struck by lightning, and set on fire. The passengers and eight kegs of specie were transferred to a brig which was passing. The fire was confined to the hold, and was got under sufficiently to enable the ship to sail for an intermediate port, whither she was accompanied by the brig. While in the harbor, and before reaching the wharf, the captain of the ship took the specie, and afterwards deposited it in a bank. It was held, that the specie was liable to contribute for all general average expenses incurred subsequent to the removal of the specie, as well as for those prior. The question, perhaps, is to be determined by the fact whether the voyage was broken up to such a degree that the owner of the cargo had a right to take the goods on. For it has been held that if while a vessel is being repaired at an intermediate port, the owner takes the cargo, he is liable for subsequent average expenses. Sherwood *v.* Ruggles, 2 Sandf. 55. But this distinction is not noticed in the cases above cited. In The Ann D. Richardson, Abbott, Adm. 499, it was held, that the cargo was not to be charged with any expenses incurred in respect to it after the voyage was broken up and abandoned. Mr. Justice *Betts* said: "The charges for reparations made to the vessel subsequently, may properly be referred to as a means of measuring the actual value of her injuries sustained for the common benefit. That allowance has no application to claims for the care and management of the cargo after it ceased to be connected with the vessel for the purposes of the voyage. Services or expenditures of that character have no connection with the ship or the injuries she incurred for the common advantage, and cannot, therefore, be subjects of general average."

there (or if sold before, their actual proceeds), or their net value for sale as estimated.[1] It has happened that the goods so sold brought much more than the price they would have brought at the place of destination. If this is now taken as the value of the goods lost, the shipper makes a profit; if as the contributory value of the goods which pay, he loses; but in our judgment these consequences may be set off against each other, and the general rule should still be that an actual sale at the port of adjustment determines the value of the goods.[2]

We think, also, that from the value of the goods should be deducted the freight paid or payable on them. The owner pays, or loses the freight, because the goods are brought in safely. He would have saved the freight had they been lost; and he has saved the goods less the freight by their being brought into port; and it is only the saved property, or the saved value, which contributes. If the vessel arrives at the home port, or if it is wrecked and the goods are sent on, the general rule is that they shall contribute according to their value there.[3] In New York, their value is taken to be the first cost at the port of departure and charges.[4] In Massachusetts, the value at the time and place of the occurrence of the average expense is taken.[5]

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[1] See Stevens & Benecke on Av., Phillips' ed. pp. 68–74, 193, 194; 2 Phillips on Ins. § 1401. In Lee *v.* Grinnell, 5 Duer, 400, 430, where the cargo was damaged while in port and sold, it was held that the amount it brought at the sale was to be taken as the fair value.

[2] Richardson *v.* Nourse, 3 B. & Ald. 237. In this case goods were sold at an intermediate port, in order to pay for necessary repairs, at a price higher than they would have brought at the port of destination. A reference being had to settle the loss, the arbitrators allowed for the actual value of the goods when sold, and not for their value at the port of destination. The case came before the court on a motion to set aside the award. It was held that as it did not clearly appear that the award was contrary to any well-established principle of law, it must stand. Mr. Phillips says: "There is a diversity of opinion on this question among practical underwriters in the United States." Stevens & Benecke on Av., Phillips' ed. 194.

[3] Barnard *v.* Adams, 10 How. 270, 307. In this case the court said: "The place where average shall be stated is always dependent more or less on accidental circumstances, affecting not the technical termination of the voyage, but the actual and practical closing of the adventure. We see nothing in the circumstances to take this case out of the general rule that contribution should be assessed on the value at the home port." See also, Gillett *v.* Ellis, 11 Ill. 579; Gray *v.* Waln, 2 S. & R. 229.

[4] Leavenworth *v.* Delafield, 1 Caines, 573. See also, Mutual Safety Ins. Co. *v.* Cargo of Ship George, Olcott, Adm. 157, 166.

[5] Douglas *v.* Moody, 9 Mass. 548. In Spafford *v.* Dodge, 14 Mass. 66, it was held

If the ship returns to her port of departure, and the adjustment of average is made there, it seems to be the practice to take the invoice cost of the goods as their contributory value.[1] The old rule to ascertain the value of the goods to be contributed for, was, if half the voyage had been performed, to take the price at the port of discharge, if not, at the price they cost; but this rule was long since done away with.[2] If the goods are insured, their valuation in the policy would generally be conclusive, if made without fraud, in case of an adjustment at the home port.[3]

Profits do not contribute under that name. It is obvious, however, that when the contributory value of the goods, is their value at the port of destination, it is their value as enhanced by the transportation, and therefore the profits are included in fact.[4]

So, too, as to the valuation of the freight, there are some points not positively settled by law or by practice. Only the freight earned, pays;[5] and if that be only a *pro rata* freight, that only contributes,[6] and from the freight all expenses necessary for earning it, should first be deducted.[7]

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that to ascertain this value, the value of the goods at the port of lading was to be taken, unless it should appear that the value was increased by being carried to the port where the average expense became necessary.

[1] Tudor *v.* Macomber, 14 Pick. 34. See the case at length in the next note.

[2] This is said to be the rule in 2 Molloy, ch. v. § iv.; Beawes, Lex Mercatoria, 148; Consolato del Mare, ch. 95; Emerigon, ch. xii. sect. xliii. § 5, Meredith's ed. p. 505. The whole subject was elaborately discussed in Tudor *v.* Macomber, 14 Pick. 34. In this case a vessel with a cargo of ice, on a voyage from Boston to Charleston, S. C., was driven on shore at Chatham. The ice was thrown overboard for the preservation of the ship. The court, speaking of the old rule, said: "It has been exploded. It is of very difficult and uncertain application. . . . . We think that if the vessel arrives at the port of destination, the value should be the net price for which the cargo might have been sold there. That is undoubtedly the rule in Great Britain, France, Spain, and Prussia. Benecke, 288. 'But,' says the same author, 'should a jettison take place so near the port of departure that the vessel returns to the same, or to a neighboring port, the actual price of replacing the goods thrown overboard should be allowed; or if that could not be done, the *cost price*, including shipping charges and premiums of insurance, should be the rule by which the value of the goods jettisoned should be ascertained.' We think this is the sound rule in such a case."

[3] Tudor *v.* Macomber, 14 Pick. 34, 39.

[4] The Nathaniel Hooper, 3 Sumner, 542; 2 Phillips on Ins. § 1294.

[5] Lee *v.* Grinnell, 5 Duer, 400, 431.

[6] The Nathaniel Hooper, 3 Sumner, 542; Maggrath *v.* Church, 1 Caines, 196; Gray *v.* Waln, 2 S. & R. 229.

[7] Williams *v.* London Ass. Co., 1 M. & S. 318.

Whatever freight the ship loses by jettison of the goods, or by any sacrifice, is, of course, to be contributed for.[1] So if she be voluntarily stranded to save the cargo, and being lost cannot carry it on and earn her freight, this is a part of the sacrifice.[2] But if the voyage is broken up in any other way, and not in consequence of a voluntary sacrifice, the freight lost is not to be contributed for.[3] When freight is entitled to contribution, the value is the gross freight lost by the sacrifice.[4] Nor is it more doubtful, perhaps, that the net freight only on the goods saved and carried, is called upon to contribute. But the difficulty comes when we have to determine what is this net freight. It is usually reached by deducting a certain proportion from the gross freight; as one fourth, or one third, or one half; most frequently, one third.[5] Practically, the question seldom causes any embarrassment; because in most commercial ports some rule prevails, which is sanctioned by general usage there; and, as we shall presently see, an adjustment made at a proper place, according to the law of that place, is binding upon all parties and interests.[6]

If freight were paid in advance, and was not to be repaid in

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[1] The Nathaniel Hooper, 3 Sumner, 542; The Ann D. Richardson, Abbott, Adm. 499; Nelson *v.* Belmont, 5 Duer, 310, 322.

[2] In Col. Ins. Co. *v.* Ashby, 13 Pet. 331, 344, Mr. Justice *Story* said, upon this point: "It seems to us, that, as by the loss of the ship, the freight was totally lost for the voyage, it was properly included in the loss, and as a sacrifice by the ship-owner for the common benefit." See also, Gray *v.* Waln, 2 S. & R. 229.

[3] Lee *v.* Grinnell, 5 Duer, 400, 431; Nelson *v.* Belmont, 5 Duer, 310, 323; Tudor *v.* Macomber, 14 Pick. 34.

[4] 2 Phillips on Ins. § 1368; Mutual Safety Ins. Co. *v.* Cargo of the Ship George, Olcott, Adm. 157.

[5] Freight shall contribute at one half of the gross sum agreed to be paid. Leavenworth *v.* Delafield, 1 Caines, 573; Heyliger *v.* N. Y. Firem. Ins. Co., 11 Johns. 85. In Humphreys *v.* Union Ins. Co., 3 Mason, 429, 439, Mr. Justice *Story* states that the practice in Massachusetts has been to ascertain the contributory value of freight by deducting one third of the gross amount. The foreign laws on this subject are very diverse. See Stevens & Benecke on Av., Phil. ed., 215, 255. In Mutual Safety Ins. Co. *v.* Cargo of the Ship George, Olcott, Adm. 157, it was held, that the freight should contribute at its gross value, deducting therefrom all necessary expenses incurred, if any, subsequent to the wreck. If there is a charter-party, and freight is to be paid for the round voyage out and home, and the principal object of the voyage is to obtain a return cargo, if a loss occurs on the outward voyage, the freight for the round voyage contributes. Shelton *v.* Brig Mary, U. S. D. C., Mass., 5 Law Reporter, 75.

[6] See post, p. 332, n. 1.

any event, this was not at risk, and should not therefore be required to contribute.[1] By the civil law, the master of the ship was required to have the contributions settled, that is, to collect from all the paying parties their contributions, and pay them to, or hold them for, the losing parties.[2] The ordonnance of Louis XIV. contains the same provision;[3] but Valin, in his commentary,[4] denies that it is so done in practice, and his authority can hardly be doubted. And Abbott, though not saying so directly, implies that it is not the law or usage in England.[5] We have always supposed, however, the uniform American practice to be in conformity with the provisions of the civil law. That is, the master is agent of all concerned in this matter, and he has a lien upon all the contributory goods for their contributions, and may refuse, and it is his duty to refuse to deliver these goods to their consignees, unless these contributory shares are paid for or secured by bond or otherwise.[6]

Several American cases assume this to be the practice, and speak of it as law. In a recent case, a shipper entitled to contribution, and losing it by neglect of the master in this respect, held the owners responsible.[7] And we should say that this case is in conformity with the uniform practice in this respect. It has been decided, and is undoubtedly the law, that if a master parts with the goods without such contributory payment, and afterwards pays over to the losing party the contribution to

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[1] Stevens & Benecke on Av., Phil. ed. 210, 257; 2 Phillips on Ins. § 1404.

[2] Dig. 14, 2, 2. See also, Wellwood, tit. 21.

[3] Liv. 3, tit. 8, *Du Jet.*, art. 21.

[4] Tom. 2, p. 211. See also, Pothier on Maritime Contracts, Cushing's ed., p. 76, n. 134.

[5] See Abbott on Shipping, 507. In the year 1811 a motion was made by the owner of goods, which had been jettisoned for the safety of the vessel and cargo, for an injunction to prevent the master from delivering over the rest of the cargo to the other shippers. The motion was refused by Lord Chancellor *Eldon*, on the ground that though the master was not bound to part with any of the cargo, until security should be given by each shipper for his proportion of the loss, yet that every owner of a part of a cargo could not compel him to do so. Hallett *v.* Bousfield, 18 Ves. 187. It is also incidentally remarked in two subsequent cases that the master has a lien, but the nature or extent thereof is not pointed out. Simonds *v.* White, 2 B. & C. 805; Scaife *v.* Tobin, 3 B. & Ad. 523.

[6] Cole *v.* Bartlett, 4 La. 130.

[7] Gillett *v.* Ellis, 11 Ill. 579. See also Dupont de Nemours *v.* Vance, 19 How. 162.

which he was entitled, he has an implied assumpsit against the person to whom he delivered the goods bound to the contribution. And the owner of the goods is also liable, although the consignee signed a general average bond.[1] And if one shipper pays all the general average expenses incurred by reason of a peril, as capture for instance, he has a right of action against a joint shipper for his proportion.[2]

The English East India Company, when they charter a ship, stipulate that there shall be no claim for contribution for general average.[3] We have never known an instance of such a provision entering into an American contract.

SECTION IX.

OF THE ADJUSTMENT OF A GENERAL AVERAGE LOSS AND CONTRIBUTION.

It is commonly said that the proper place of an adjustment is the port of final destination.[4] This is undoubtedly correct as a general rule. But we have seen that the master has the power, and indeed it is his duty not to deliver any contributory goods to their owners until their share of contribution is paid or secured to him for the benefit of the party to whom it belongs. But this implies and requires a previous adjustment; and there can hardly be an adjustment in part of any thing of which all the elements are so closely connected and interdependent. It follows, therefore, we think, that the rule should rather be as stated by Phillips, in his valuable work on insurance: "Where different parties are concerned in a general average, the jurisdiction of the

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[1] Eckford *v.* Wood, 5 Ala. 136. The court, in this case, also said, that if a party, who is bound to contribute, pays his proportion of the contribution to the master, this payment discharges him from all liability to the party entitled to contribution, though the captain should keep the money for his own use.

[2] Kern *v.* Groning, 1 Brev. 506.

[3] Hughes on Ins. 296; Stevens & Benecke on Av., Phil. ed. 252; Jackson *v.* Charnock, 8 T. R. 509.

[4] Stevens & Benecke on Av., Phil. ed. 268.

adjustment is at that port of delivery, at which their interests are to be separated."[1] This, indeed, is the port of destination for those goods which are to be delivered there. And the rule would be the same in substance, if it were that the adjustment should be made at the first port of delivery of any of the interests concerned.

Adjustments are usually made by persons who make this their especial business. They are called, on the continent of Europe, *despacheurs;* and this word not unfrequently occurs in English and American books; but we have seldom heard it used orally. With us, averages are usually adjusted by insurance brokers.

It is an ancient and universal rule, founded upon obvious reasons, and indeed an obvious necessity, that an adjustment made at the place at which it should be made, and according to the law of that place, is binding upon all the interests embraced in it.[2] So far as regards the original owners, there is scarcely any exception or qualification to this rule.[3] Some questions have arisen where these owners are represented by insurers, which will be considered when we treat of Insurance in a subsequent volume. In our note we cite, for the convenience of the reader, the cases in which this question has been decided in either way.[4]

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[1] 2 Phillips on Ins. § 1413.

[2] In delivering the opinion in Simonds *v.* White, 2 B. & C. 805, *Abbott*, C. J., said: "The shipper of goods, tacitly, if not expressly, assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average, he must be understood also to assent to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." See also, Daglish *v.* Davidson, 5 Dowl. & Ry. 6; Lewis *v.* Williams, 1 Hall, 430; and cases below, note 3.

[3] In Chamberlain *v.* Reed, 13 Maine, 357, it was held, that an adjustment made on the protest and representations of the master, would not preclude the owner of goods shipped on board from showing that the loss was occasioned through the culpable negligence, or want of skill of the master, and was not, therefore, a case for a general average contribution.

[4] In the following cases it has been decided that an adjustment made at a foreign port is not binding on an insurer. Power *v.* Whitmore, 4 M. & S. 141; Thornton *v.* U. S. Ins. Co., 3 Fairf. 150; Lenox *v.* United Ins. Co., 3 Johns. Cas. 178; Shiff *v.* La. State Ins. Co., 18 Mart. La. 629. And it has been held that it was so binding, in Newman *v.* Cazalet, Park, Ins. 566, n.; Walpole *v.* Ewer, Park on Ins. 565; Strong *v.* N.

We would add the general remark, that while the law of general average is the same whether the property lost or contributory is insured or not, much the greater number of cases in which this law has come into question are insurance cases; and we shall be obliged to consider hereafter some, at least, of the principles above stated, as they present themselves under the law of insurance. We shall here state very briefly the remedies which a party entitled to contribution has against the subjects liable to contribute. First, as to the rights of the owner of the ship. Having possession of the goods, the master has a lien by the common law, and may retain them till an adjustment is made and settled, or till the consignees sign a general average bond.[1] And there is no exception to this rule in favor of the United States.[2]

The practice formerly prevailed to a considerable extent for the owner of the ship to bring a suit *in rem* against the goods bound to contribute where they had been delivered up by the master.[3] But it was held, by the Supreme Court of the United States, that the lien of the master or owners, being but a common law lien, could not be enforced in admiralty.[4] We think, however, this case was wrongly decided, for there seems to be no subject over which the admiralty should more properly take jurisdiction, than general average. The reasons on which the decision of Cutler *v.* Rae rests, have been much shaken by recent decisions,[5] and further adjudication is necessary to settle

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Y. Firem. Ins. Co., 11 Johns. 323; Depau *v.* Ocean Ins. Co., 5 Cow. 63; Loring *v.* Neptune Ins. Co., 20 Pick. 411. The question was discussed by Mr. Justice *Story*, with his usual learning and ability, in the case of Peters *v.* Warren Ins. Co., 1 Story, 463, and a strong opinion expressed in favor of the latter view of the case, though he expressly stated that he did not wish to be understood as deciding the point.

[1] Strong *v.* N. Y. Firem. Ins. Co., 11 Johns. 323; Sherwood *v.* Ruggles, 2 Sandf. 55; Thornton *v.* U. S. Ins. Co., 3 Fairf. 150; Chamberlain *v.* Reed, 13 Maine, 357.

[2] United States *v.* Wilder, 3 Sumner, 308.

[3] Mutual Safety Ins. Co. *v.* Cargo of the Brig George, Olcott, Adm. 89.

[4] Cutler *v.* Rae, 7 How. 729.

[5] In Dike *v.* Propeller St. Joseph, 6 McLean, C. C. 573, the court said: "The decision, however, in the case of Cutler *v.* Rae, was by a divided court, and it has not been satisfactory to the profession, nor was it a decision in accordance with the prior decisions of the Supreme Court. I should conform to it in a case that could not be distinguished from its principles." And in Dupont de Nemours *v.* Vance, 19 How. 162, Mr. Justice *Curtis*, speaking of Cutler *v.* Rae, said: "The court decided, that, though the master, as the agent of the owner of the vessel in that case, had, by the

the question. It has been held, that a libel *in rem* is maintainable against the vessel in admiralty, by a shipper entitled to contribution.[1]

The right of the master to maintain assumpsit against each shipper for the amount severally due, which is given by the common law,[2] is inconvenient and expensive where there are many shippers, and the usual and most effectual way of obtaining relief, at the present day, is by a bill in equity.[3]

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maritime law, a lien upon the goods, as security for the payment of their just contribution, this lien was lost by their voluntary delivery to the consignee; and that the implied promise to contribute could not be enforced by an action *in personam* against the consignee, in the admiralty. This admits the existence of a lien, arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation; which, as is well known, is waived by an authorized delivery without insisting on payment." If this be the reason for the distinction, it follows that no action will lie *in personam* for freight, where the goods have been delivered up.

[1] Dike *v.* Propeller St. Joseph, 6 McLean, C. C. 573; Dupont de Nemours *v.* Vance, 19 How. 162. In a case prior to this latter decision, Mr. Justice *Curtis* held, on the authority of Cutler *v.* Rae, that there was no lien *in rem* against the vessel in such a case. Beane *v.* The Mayurka, 2 Curtis, C. C. 72. But the decision in Dupont de Nemours *v.* Vance, to the contrary effect, was given by the same learned judge, and in a still more recent case the correct rule that a lien exists has been laid down. The John Perkins, U. S. C. C., Mass., 1857, 21 Law Reporter, 87, 96.

[2] Sherwood *v.* Ruggles, 2 Sandf. 55; Marsham *v.* Dutrey, Select Cases of Evid. 58; Birkley *v.* Presgrave, 1 East, 220; Dobson *v.* Wilson, 3 Camp. 480.

[3] Sturgess *v.* Cary, 2 Curtis, C. C. 59. See also, Sheppard *v.* Wright, Show. P. C. 18; Doane *v.* Keating, 12 Leigh, 391.

CHAPTER X.

OF STOPPAGE IN TRANSITU.

SECTION I.

OF THE ORIGIN AND HISTORY OF THE RIGHT OF STOPPAGE IN TRANSITU.

The right of stoppage *in transitu* may be defined as the right by which the seller of goods to a distant purchaser, who becomes insolvent, stops them, if he can do so, before they come into the possession of the purchaser.

It is now quite settled that this right belongs to the seller who sends his goods by land, as well as to him who sends them by sea. And the consideration of it might seem to belong, in some respects at least, to an investigation of the law of purchase and sale. But it originated with waterborne goods, and is still exercised far more frequently in those cases than in land carriage. And it therefore may properly — as it is usually — be regarded as a part of the law of shipping.

When, and how this law of stoppage *in transitu* became a part of the law of England, is not quite certain. Its introduction is comparatively recent; and it is very important to ascertain, if we can do so, the foundation, and determining principles of this now well-established rule of law; and some inquiries into its origin and history will help us to do this.

There are in fact three ways, in either of which it might be supposed that the law of stoppage *in transitu* entered into the law of England. One by adoption from the continental law, which is based upon the civil law. This law, in the case of a sale,

does not consider the right of property as passing to the buyer, until he has possession of the goods.[1] It distinguishes carefully, and we think wisely, between the *jus ad rem*, which such a buyer gets by the sale to him, and the *jus in re*, into which the *jus ad rem* ripens as soon as the buyer takes possession. It follows, therefore, that the seller continues to own the goods until they reach the buyer. He need not stop them, nor do any thing else to revest any title in himself. If they are not in the possession of the buyer when the buyer becomes insolvent, they do not pass into his general assets, leaving the seller to take his dividend; but the insolvency leaves the goods the property of the seller. This we understand to have been the principle of the rule in Scotland, and in most other countries in which the civil law prevails. But in Scotland it seems to be otherwise now.[2] In France also, the rule has been made more like our own; that is, some act equivalent to stoppage is required to give to the seller full security in the goods.[3] But it is plain that this rule of the civil law could not be adopted in England, where the precisely opposite rule prevails, namely, that a sale does of itself pass the property to the buyer without delivery. By the civil law, the seller was indeed permitted to reclaim the property from the possession of the buyer, within a short period, on the ground that the speedy insolvency implied fraud, if the very goods had not been sold by the buyer, and could be distinctly separated and identified.

Another way is, by supposing that the seller had, until the goods reached the buyer, a right to rescind the sale for non-payment, provided the buyer became insolvent; and that the act of stoppage *in transitu* was an exercise of this right. This was at one time rather a favorite view; and in some cases the courts seem to have endeavored to establish this as the true theory of

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[1] Dig. 18, 1, 19. See also, id. 19, 1, 13, 8; and 14, 4, 5, 18.

[2] Formerly in Scotland the doctrine of restitution, grounded on presumptive fraud *intra triduum* of the bankruptcy of the buyer, prevailed. The last case, in which this doctrine was held, was decided in 1789, but on appeal to the House of Lords, the doctrine was reprobated and has since been abandoned, and the law of England on the subject is now in force. Bell's Comm., Book ii. ch. vi. § 1.

[3] Code de Commerce, liv. iii. tit. iii. art. 576, *et seq.*; Rodman's Translation, p. 301. See also, Bell's Comm. Book ii. ch. vi. § 1.

stoppage *in transitu*. But they failed, as we think, entirely. We should say that in England the course of adjudication was against this doctrine, and in this country, it is so, very certainly.[1]

The third way is, by supposing that the common law doctrine, of the seller's lien on the goods sold for his price as long as he has them in his possession, continues in force after they have left his possession, and until they have reached the possession of the buyer; or in other words, that the goods are considered as constructively in the possession of the seller until the buyer has actual possession.

In our own view, we must combine the first and the third of these three ways, in order to account for the law of stoppage *in transitu*, as a part of the English law and of our own.

We mean, that this law, in part as a direct consequence of the rules of the civil law, then even more than now, widely prevailing; and in part from its obvious reason and justice, became a part of the law-merchant as established by general usage and custom. That when it came first before the observation of the courts, they found it thus established, and saw it to be reasonable and just, and looked about to find in the English law some principle by means of which it could be received. And they found this in the law of lien, and in the continued constructive possession of the seller; and thus founded the law of stoppage *in transitu* upon this lien, making the act of stoppage only an exercise of this lien; and therefore regulating the law of stoppage by the general principles which belong to the law of lien.

We may remark in passing, that this is by no means the only instance in which the English law of lien in the seller is used to neutralize the ill effect of the rule, that the sale without delivery passes the property to the buyer. Indeed, this rule of lien seems to have been devised to supply the want of the civil law distinction between the *jus ad rem* and the *jus in re;* and if permitted to have this effect, it will aid in the solution of some of the vexed questions of the law of sales.

To return to the origin and foundation of the law of stoppage *in transitu*, we shall find that the cases sustain the views above expressed. The earlier ones certainly do; and if later authori-

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[1] See post, p. 340, n. 2.

ties have sought, as we have intimated, to change the ground from that of lien to that of rescission, the latest return, as we think, to the original doctrine.[1]

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[1] The first notice we have of this rule in the books, is in the case of Wiseman *v.* Vandeputt, 2 Vern. 203, in 1690. It was clearly a case of stoppage *in transitu*; and the right of the seller was sustained by the court, then consisting of lords commissioners, in a very brief opinion, without giving much reason, or referring to much authority or usage. Then came Snee *v.* Baxter, 1 Atk. 245, in which the right is very positively asserted by Lord Hardwicke. This case is said by *Buller*, J., in Lickbarrow *v.* Mason, as cited in the note to Newsom *v.* Thornton, 6 East, 20, 28, to be "miserably reported." It is not easy to get at the exact force or application of all that Lord Chancellor Hardwicke says. It seems, however, to be certain that he puts the case on equitable, rather than on legal principles. He says: "He who would have equity, must do equity," and afterwards says: "Though goods are even delivered to the principal, I could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come in as a creditor only for a shilling perhaps in the pound, unless the law goes upon the general credit the bankrupt has gained by having them in his custody." This would seem to be an implied approval of the rule of the civil law, and a declaration that the common law is otherwise. His lordship immediately adds: "But while goods remain in the hands of the original proprietor, I see no reason why he should not be said to have a lien upon them till he is paid, and reimbursed what he so advanced; and *therefore* I am of opinion the defendant had a right to retain them." This is, in the first place, an assertion of common law rule of lien in the case of sale, as well established then as it is now; and in the next place, by making this rule the ground of supporting a stoppage *in transitu* (which last two words are used in the decision), it is certain that the Chancellor considered the goods as in the possession of the seller, until they reached the buyer; and that the stoppage *in transitu* was only an exercise of the lien of the seller.

The case would be more valuable in this respect, did it not turn very much on the effect of an assignment by the bankrupt of the bills of lading for the goods. In one paragraph the Chancellor says: "This must depend upon the custom of merchants, and here indeed there is a contrariety of evidence." But from what follows, we apprehend that this diversity related not to the right of stoppage *in transitu*, but to the general usage in reference to the indorsement of bills of lading.

The next case is also in equity. It is that of D'Aquila *v.* Lambert, Amb. 399, 2 Eden, 75, in 1761. The original seller, who had demanded the goods of the shipmaster, filed a bill to obtain them. The language of the Lord Chancellor, in decreeing for the plaintiff, is quite remarkable. "This is a question of extent and consequence in trade. If it had been *res integra*, I should have required a more extensive argument, and taken time to consider; but it is not a case of difficulty. Has been settled by several determinations, which have been universally approved of by merchants."

It is to be noticed that *Buller*, J., in his opinion in Lickbarrow *v.* Mason, quoted in a note to Newsom *v.* Thornton, 6 East, 25, considers precisely the question we have above presented, and his words are very emphatic. He says: "I will beg leave to make a few observations on the right of stopping goods *in transitu*, and on the nature and principles of liens. . . . It is a contradiction in terms to say, that a man has a lien on his own goods, or a right to stop his own goods *in transitu*." He goes on to illustrate his position at much length; asserting that, until 1690, "this right, or privilege, or

We deem this question, of the origin of the law of stoppage *in transitu*, as one which should be clearly determined, for whether it is a lien, or a right of rescission, is not merely a technical question, but it involves consequences of the utmost importance.

SECTION II.

THAT THIS RIGHT IS BUT AN EXTENSION OF THE LIEN OF THE SELLER.

If a seller, who stops the goods which he has sold, in their transit to the buyer, thereby rescinds the sale, or annuls it, the goods, which, by the sale, became the property of the buyer, by this annulling of the sale, cease to be his property and become again the property of the seller. In other words, the rights and obligations of the parties are the same as if there had never been any sale. Of course the buyer cannot tender the price and take the goods unless the seller chooses to resell them to him. And the seller has his goods but no further claim against the buyer for any deficit in the price. Nor need the seller wait any time, or give any notice, or do any act to complete his title; but may sell the goods at once, to whom he will, as freely as if they had never been sold by him. And if they sell for more than their price, the profit remains with the seller, who sells them as his own.

A totally different state of things is produced by a stoppage *in transitu*, if that stoppage be only the exercise of a lien by the

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whatever it may be called, was unknown to the law," and declares that it is founded wholly on equitable principles. Although this right thus appears to have originated in equity, it is now said that equity will not enforce it. See Goodhart *v.* Lowe, 2 Jacob & W. 349. It was held in this case that the court would not prevent by injunction the sailing of a ship which had the consignor's goods on board, to enable him to resume possession of them, but would leave him to his remedy at law. And in Meletopulo *v.* Ranking, 6 Jur. 1095, 1 N. Y. Legal Observer, 299, Lord Chancellor Lyndhurst intimated that a trial by jury was the proper remedy. In this country, in some of the states, the courts of chancery exercise jurisdiction over stoppage *in transitu*. Ford *v.* Sproule, 2 A. K. Marsh. 528; Hause *v.* Judson, 4 Dana, 7; Secomb *v.* Nutt, 14 B. Mon. 324; Parker *v.* M'Iver, 1 Des. 274. See also, Conyers *v.* Ennis, 2 Mason, 236.

seller, upon the goods of the buyer, for the price of the goods. Then the goods are in the hands of the seller as a security for a debt due to him from the buyer who owns the goods. It will follow, first, that the buyer or his assigns, by paying whatever is due upon the goods, discharges the lien and destroys the seller's right of possession. Next, that the seller can treat the goods only as if they were pledged to him for the debt; that is to say, he must give notice to the buyer that he intends to sell them for his debt, or get a decree in equity for the sale, and give the buyer, who owns them, a reasonable opportunity of redeeming them, and then he may sell them, but still as the buyer's property; and finally, if the proceeds are more than sufficient to pay the debt and charges, the balance must be returned to the buyer; and if they are not sufficient to pay the debt, the buyer still owes for the balance, and if he has gone into bankruptcy, the seller may come in for a dividend on his balance.

These differences are admitted; and our notes will show, conclusively we think, that the latter supposition, or that of a lien by the seller on the goods of the buyer for their price, is the American theory of stoppage *in transitu*. And there are cases in England, which not only assert this in the broadest terms,[1] but others in which principles drawn from this theory are applied.[2] Thus a mere surety for the price cannot stop the goods,[3]

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[1] As *Buller*, J., in Lickbarrow *v.* Mason, cited in the previous note.

[2] This question was discussed in Clay *v.* Harrison, 10 B. & C. 99, but was not decided. See Stephens *v.* Wilkinson, 2 B. & Ad. 320. The authorities are strongly in favor of holding the right of the vendor to stop the goods as an extension of the common law lien for the price, or, as Lord *Kenyon* observed, in Hodgson *v.* Loy, 7 T. R. 445, as "a kind of equitable lien adopted by the law, for the purposes of substantial justice." The history and character of this right were much discussed in Lord *Abinger's* opinion in Gibson *v.* Carruthers, 8 M. & W. 321. See also, Wentworth *v.* Outhwaite, 10 M. & W. 436. In the following cases in England this right has been considered as an equitable lien, and not a rescission of the contract. Gwynne, *Ex parte*, 12 Ves. 379; Martindale *v.* Smith, 1 Q. B. 389. See also, Wilmshurst *v.* Bowker, 5 Bing. N. C. 541, 7 Man. & G. 882; Bloxam *v.* Sanders, 4 B. & C. 941; Edwards *v.* Brewer, 2 M. & W. 375; James *v.* Griffin, id. 632. In this country the right is universally considered as an extension of the common law lien. Hunn *v.* Bowne, 2 Caines, 38, 42; Rowley *v.* Bigelow, 12 Pick. 307, 313; Stanton *v.* Eager, 16 id. 467, 475; Newhall *v.* Vargas, 13 Maine, 93, 15 id. 314; Rogers *v.* Thomas, 20 Conn. 53; Jordan *v.* James, 5 Ohio, 88. The vendee, or his assignees, may recover the goods, on payment of the price, and the

[3] Siffken *v.* Wray, 6 East, 371.

because the lien exists only between vendor and vendee. And only a consignor who is actually, or virtually and substantially, a vendor, can exercise it.[1] A principal who consigns goods to his factor may certainly stop them on hearing of his factor's insolvency;[2] but so he may generally without the insolvency of the factor, on the common principles of agency. And we should apply the same principles, or analogous ones, to the case of one remitting money for a particular purpose and stopping it on the way, rather than the technical right of stoppage *in transitu*.[3]

Hence, also, from this supposition of a lien, if the consignor sends the goods for a precedent debt he cannot stop them; for this debt, as it were, pays the price for the goods, and there can be no lien.[4] But an unadjusted state of accounts and an uncertainty as to the balance will not prevent a stoppage;[5] nor will the acceptance of negotiable paper, unless where that is deemed payment, even if it be indorsed over; and if such a bill be proved before commissioners of insolvency, the dividend paid

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vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment of the price. If he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto* on the goods detained. Kymer *v.* Suwercropp, 1 Camp. 109; Newhall *v.* Vargas, 13 Maine, 93, 15 id. 314.

[1] Thus, if a trader in one country should send an order to his correspondent in another country to procure and ship him certain goods, which the latter should procure *on his own credit*, without naming the principal, and ship them to him at the original price, adding only his commission, he would be considered as a *vendor* so far, at least, as to give him the right of stoppage *in transitu*. Feise *v.* Wray, 3 East, 93; Newhall *v.* Vargas, 13 Maine, 93. See also, Ilsley *v.* Stubbs, 9 Mass. 65, per *Sewall*, J.; Tucker *v.* Humphrey, 4 Bing. 516.

[2] Kinloch *v.* Craig, 3 T. R. 119, 783.

[3] Smith *v.* Bowles, 2 Esp. 578. *Aliter*, where it is a general remittance from a debtor to his creditor on account of his debt.

[4] Haille *v.* Smith, 1 B. & P. 563; Smith *v.* Bowles, 2 Esp. 578; Vertue *v.* Jewell, 4 Camp. 31; Clark *v.* Mauran, 3 Paige, 373; Wood *v.* Roach, 1 Yeates, 177, 2 Dall. 180; Summeril *v.* Elder, 1 Binn. 106. See also, Anderson *v.* Clark, 2 Bing. 20; Evans *v.* Nichol, 4 Scott, N. R. 43.

[5] Wood *v.* Jones, 7 Dowl. & Ry. 126. In this case a merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold or the proceeds ascertained, the latter shipped three cargoes of timber to the former, to credit in his account. Two of them arrived. Against the third the consignor drew a bill for the amount, while it was *in transitu*. In the interval the consignee dishonored the bill, and became insolvent. Held, that the consignor had a perfect right of stoppage *in transitu*, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted.

on it will be considered only as so much paid towards the price of the goods, even though the bill is not yet mature.[1] Nor will the actual receipt of part payment;[2] for neither of these would destroy the lien of the seller. And if there be a part payment and the seller afterwards stops the goods *in transitu*, the buyer cannot recover back the part payment, as he might do if the stoppage *in transitu* were a rescission of the sale.[3]

SECTION III.

WHEN THIS RIGHT MAY BE EXERCISED.

A. *Of the Constructive Possession of the Seller.*

While the seller retains actual possession of the goods, the ancient rule of lien makes them his security.[4] When the buyer takes them into his actual possession, all lien of the seller is at an end. The stoppage must, therefore, be only while the goods are *in transitu;*[5] and that is when they are not in the actual possession of either. But in the application of the rule the law

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[1] Feise *v.* Wray, 3 East, 93; Jenkyns *v.* Usborne, 7 Man. & G. 678; Newhall *v.* Vargas, 13 Maine, 93; Bell *v.* Moss, 5 Whart. 189; Donath *v.* Broomhead, 7 Barr, 301. It has been said that the consignor need not tender back the bill. Edwards *v.* Brewer, 2 M. & W. 375; Hays *v.* Mouille, 14 Penn. State, 48.

[2] Hodgson *v.* Loy, 7 T. R. 440; Newhall *v.* Vargas, 13 Maine, 93.

[3] Newhall *v.* Vargas, 13 Maine, 93.

[4] In M'Ewan *v.* Smith, 2 H. L. Cases, 309, Lord *Campbell*, speaking of the case where the vendor had not parted with the possession, said: "Several of the judges in the court below discussed at great length the question of stoppage *in transitu*. That doctrine appears to me to have no more bearing on this case than the doctrine of contingent remainders." It was held, in this case, that the vendor, not having parted with the possession, had a right to retain the goods. See also, Parks *v.* Hall, 2 Pick. 206, 212; Gibson *v.* Carruthers, 8 M. & W. 321; Miles *v.* Gorton, 2 Cromp. & M. 504.

[5] Wood *v.* Yeatman, 15 B. Mon. 270; Warren *v.* Sproule, 2 A. K. Marsh. 528, 536. In Conyers *v.* Ennis, 2 Mason, 236, before Mr. Justice *Story*, it was urged that the right of the consignor to stop property, in cases of insolvency, ought not to be confined to stoppage *in transitu*, but should, in equity, extend to all cases, where the property is not paid for, and remains in the hands of the consignee. But that learned judge held, that the right of the consignor was gone as soon as the goods reached the consignee, and that equity could not relieve the seller.

goes somewhat further, and inquires, also, into the constructive possession of the goods. For they may be in the actual possession of the seller, and yet so far, constructively, in the possession of the buyer, that the seller cannot stop or retain them. Or they may be in the actual possession of the buyer, but under such circumstances that the seller's right of stoppage is not taken away. It becomes, therefore, very important to ascertain when the transit, so far as this right is concerned, ceases.

We will consider this question under the different heads of goods warehoused, goods in the hands of a carrier, goods on board of a ship, and goods transferred by a bill of lading.

B. *Of Goods Warehoused.*

In general, every warehouse-man is the agent of any party who puts the goods in his warehouse and can take them out at his pleasure; and, therefore, his possession is the possession of such party. This is carried so far, that where a seller had a warehouse, and it was a part of the bargain of sale, that the goods might remain in his warehouse until the buyer took them out, without charge; and they remained there after the sale under this bargain, it was held that this actual possession of the seller was the constructive possession of the buyer, and that the seller could not stop or retain them for the price.[1]

On this point it is a material question whether any thing remains to be done by the seller; if nothing, this goes far to

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[1] Barrett *v.* Goddard, 3 Mason, 107. See also, Hammond *v.* Anderson, 4 B. & P. 69. Townley *v.* Crump, 4 A. & E. 58, is, however, *contra*. And the same rule applies *a fortiori* if the vendee pays warehouse rent. Hurry *v.* Mangles, 1 Camp. 452; Phillimore *v.* Barry, id. 513. In Miles *v.* Gorton, 2 Cromp. & M. 504, the goods, in the warehouse of the vendor, were sold under an invoice which expressed that they were to remain at rent. A bill of exchange for the price was given and negotiated, but before maturity, the vendee became bankrupt. Held, that the vendor had not lost his lien. The court said: "Here, in point of fact, the warehouse rent was not actually paid, but only charged, and such charge amounted to a notification by the seller to the purchaser that he was not to have the goods, not only until the payment of the price, but of the rent. In this case, therefore, the vendor had originally a right to hold, both for the price and the rent; and I think that the effect is not to make, as has been argued, the warehouse of the vendor the warehouse of the vendee, but to make it a part of the contract between the parties, that the goods are not to be delivered until not only the price, but the rent, is paid."

make the warehousing a delivery to the buyer; not so, however, if the seller must still do something to or with the goods before they are delivered.[1]

If a seller of goods that are warehoused deliver an order for them to a buyer, this alone may not transfer the possession.[2] But if the buyer delivers the order to the warehouse-man, this, in general, does transfer possession;[3] and still more so if the ware-

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[1] Hanson *v.* Meyer, 6 East, 614. In this case a person contracted to sell all his starch then at the warehouse of another at £6 per hundred weight, to be paid for by a bill of exchange. A certain number of days were allowed for delivery. The vendor wrote an order to the warehouse-man to weigh and deliver the starch. Held, that the property did not pass so as to defeat the right of the vendor to stop the goods, till they were weighed. In Wallace *v.* Breeds, 13 East, 522, a quantity of oil in casks was sold. By the usage of trade the casks were to be searched by the seller's cooper; and a broker, on behalf of both the buyer and seller, was to attend to make a minute of the foot-dirt and water in each cask, and the casks were then to be filled up by the cooper with oil at the seller's expense, and delivered in a complete state. Held, that until these things were done the right existed. See also, Rugg *v.* Minett, 11 East, 210; Zagury *v.* Furnell, 2 Camp. 240; Stoveld *v.* Hughes, 14 East, 308; and cases *infra*, p. 345, note 3.

[2] M'Ewan *v.* Smith, 2 H. L. Cases, 309. The facts in this case were as follows: J. & A. Smith, the owners of sugars in the warehouse of Messrs. Little & Co., sold them to Bowie & Co., and gave them a delivery order for the sugars upon their agent, Alexander. In the books of the warehouse-men the sugars were entered as received by them from Alexander on account of J. & A. Smith. Alexander had them weighed and invoiced upon the order of the Smiths. Bowie & Co. sold the sugars to M'Ewan & Sons, and transferred to them the delivery order. Neither of the vendees took any steps to act upon the order. Bowie & Co. having become insolvent, the Smiths removed the sugars to another warehouse. It was held that they had never lost possession of the goods, and that a delivery order does not, like a bill of lading, pass the property in goods by being indorsed over. See also, Akerman *v.* Humphery, 1 Car. & P. 53; Tucker *v.* Humphrey, 4 Bing. 516; Jenkyns *v.* Usborne, 7 Man. & G. 678. Nor are dock warrants negotiable instruments. Zwinger *v.* Samuda, Holt, N. P. 395, 7 Taunt. 265. But if the goods remain in the warehouse of the vendors, and they give the vendees samples to enable them to go into the market, and, upon sales by them from time to time to different purchasers, orders are given to enable them to receive the goods from the vendors, who deliver such parcels accordingly, the property of the whole passes to the vendees. Green *v.* Haythorne, 1 Stark. 447.

[3] Lucas *v.* Dorrien, 7 Taunt. 278. There is also a *dictum* of the court *in banc* to this effect in Harman *v.* Anderson, 2 Camp. 243. In Hollingsworth *v.* Napier, 3 Caines, 182, the goods were in a public store at the quarantine ground. The owner sold them to one Kinworthy, for cash payable on delivery, and gave him a bill of parcels of the goods and a delivery order on the storekeeper. Kinworthy, without paying for the goods, or taking possession of them, sold them to a third party, whom the jury found to be a *bonâ fide* purchaser. This person went the next day, paid the storage, marked the goods with his initials, and returned them to the public store. Held that the original vendor had no right to stop them.

house-man enter the same in his books, or otherwise accept the order so as to be responsible for the goods to the buyer;[1] or if the buyer has acted under the order and removed a part of the goods.[2] But even after such an order is given, if the seller has an important thing to do to or with the goods before their delivery, he may countermand the order.[3]

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[1] Harman *v.* Anderson, 2 Camp. 243. The effect of the transfer in the books of the wharfinger is ordinarily to constitute him the agent of the vendee. But this is not always the case. In Godts *v.* Rose, 17 C. B. 229, 33 Eng. L. & Eq. 268, an action of trover was brought for certain casks of oil. The plaintiff had contracted, by bought and sold notes, to sell to the defendant oil, at a certain price, "to be free delivered and paid for in fourteen days by cash, less 2*l.* 10*s.* per cent. discount." The oil being at a wharf, the plaintiff gave an order to the wharfinger to transfer a specified quantity of it to the defendant. The wharfinger thereupon transferred it in his books, and gave the plaintiff a notice of the transfer directed to the defendant. This the plaintiff's clerk took to the counting-house of the defendant, and delivered it to a clerk there, together with an invoice of the oils, and demanded a check in payment. This was refused, but the notice of transfer was retained by the defendant, and the oil obtained by means of it. Held, that as the sale was of no specific oil, the facts above stated did not amount to a delivery to the defendant. *Jervis*, C. J., states the law as follows: "No doubt if the vendor had given the vendee the transfer order, and the vendee had taken it to the wharfinger, and the latter had assented to the transfer, that would have bound the vendor. There must be shown to have been that kind of triangular contract adverted to in Williams *v.* Everett, 14 East, 582, where the agent of the one party becomes by agreement between all three the agent of the other. In this case there has been no such agreement of attornment, the wharfinger made no bargain with the vendee to hold for him, nor did the vendee make any bargain to accept the wharfinger as his agent. The transfer order was given to the vendee only on a condition with which he refused to comply, and there could be, therefore, no such acquiescence as was necessary to change the property in the goods in the hands of the wharfinger." In Townley *v.* Crump, 4 A. & E. 58, where the goods sold were in the warehouse of the vendor, it was held that the following delivery order, or acknowledgment, given to the vendee, would not take away the right of the vendor to retain possession, "We hold to your order," etc., describing the goods.

[2] Hammond *v.* Anderson, 4 B. & P. 69.

[3] Withers *v.* Lys, Holt, N. P. 18, 4 Camp. 237; Busk *v.* Davis, 2 M. & S. 397; Shepley *v.* Davis, 5 Taunt. 617. But if the identity of the goods and the quantity are known, as where oats in a particular bin, which contains nothing else, are sold, and a bill accepted at the same time for the price, the weighing is merely for the satisfaction of the buyer, and the transfer in the books of the wharfinger is sufficient, although the delivery order describes the goods by the weight as well as the bin, ("1,028 bushels of oats in bin 40,") and directs the warehouse-man to weigh them over. Swanwick *v.* Sothern, 9 A. & E. 895. In Whitehouse *v.* Frost, 12 East, 614, A, having forty tons of oil in one cistern, sold ten tons to B, and received the price. B sold the same to C, and took his acceptance at four months, and gave him a written order of delivery on A, who wrote and signed his acceptance upon the order, but no actual delivery was

If the buyer sells to a third party, to whom the warehouse-man certifies that the goods are transferred to his account, and who thereupon pays the price, the warehouse-man becomes responsible to this third party, although something material may remain for the original seller to do to the goods.[1] And if the seller, by his acts or words, or, we should say, if he by his unqualified order, justified the warehouse-man in so certifying, he would be responsible to the warehouse-man; or, to prevent circuity of action, he would be held as losing his right of stoppage *in transitu*. The cases which we have already cited lead to this conclusion.

If a buyer, either because he has no warehouse of his own, or because the warehouse of a carrier is more convenient to his customers, or indeed for any reason, causes his goods to be left at that warehouse, and sells them from thence without any purpose of removing them before sale to any warehouse or place of deposit of his own, the transit is ended as soon as the carrier deposits the goods in his own warehouse subject to the order of the buyer.[2]

It is, of course, while the goods are in the hands of a carrier, that they are most frequently stopped.[3] Indeed, the law originally applied only to carriers by water; and for this purpose any ship which has the goods on board is deemed a carrier.[4]

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made of the ten tons, which continued mixed with the rest in A's cistern. Held, that as nothing remained to be done between B and C, B could not countermand the order on the bankruptcy of C.

[1] Stonard *v.* Dunkin, 2 Camp. 344. The plaintiff, in this case, gave in evidence an order from one Knight, to the defendants, who were warehouse-men, to hold a quantity of malt on the plaintiff's account, and a written acknowledgment from the defendants that they so held it. It was contended that a remeasuring being necessary in an article of that kind, the property did not pass till this was done. But Lord *Ellenborough* said: "Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely overset the security of mercantile dealing, were I now to suffer them to contest his title." See also, Hawes *v.* Watson, 2 B. & C. 540; Barton *v.* Boddington, 1 Car. & P. 207; Gosling *v.* Birnie, 7 Bing. 339; Swanwick *v.* Sothern, 9 A. & E. 895.

[2] See post, p. 352, tit. F.

[3] And it makes no difference whether he be a carrier by land or by water. Stokes *v.* La Riviere, cited 3 T. R. 466; Hunter *v.* Beal, cited 3 T. R. 466.

[4] Assignees of Burghall *v.* Howard, cited 1 H. Bl. 365. And this is true, although the goods by the bills of lading are deliverable to the consignees.

C. *When the delivery on Ship-board terminates the Transit.*

A nice distinction is taken, which has been much questioned but which seems to us to be just, when the ship is owned by the buyer of the goods. For it has been held that if they are placed on board his own ship, to be carried to him, they are in transit until they reach him in the same way as if he did not own the ship.[1] But if they are placed in his ship to be carried by his

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[1] This distinction was recognized in the case of Stubbs *v.* Lund, 7 Mass. 453. There the vendors resided in Liverpool, England, and the vendees in America. The goods were delivered on board the vendees' own ship, at Liverpool, and consigned to them, or assigns, for which the master had signed bills of lading. The vendors, hearing of the insolvency of the vendees before the vessel left Liverpool, refused to let the vessel sail, claiming a right to stop the goods because they had not reached their destination. The right of stoppage was allowed mainly, it seems, on the ground that the goods were, by the bills of lading, to be transported *to the vendees*, and were in transit until they reached them; but it was thought that if the goods had been intended for some *foreign* market, and never designed to reach the possession of the purchasers, any more than they then had at the time of their shipment, the case would have been different, and the transit would have been considered as ended. *Parsons*, C. J., thus stated the law: "In our opinion the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage be, or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment (3 East, 381): but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed: because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment." See also, Ilsley *v.* Stubbs, 9 Mass. 65, 72. This distinction is also followed in Newhall *v.* Vargas, 13 Maine, 93. The purchaser, in this case, lived in America, the consignor in Havana. The former sent his own vessel to Havana, for a cargo of molasses, which was shipped on board the vessel, consigned to the vendee, and to be delivered to him at his port of residence; it was held that the vendor had the right to stop the goods at any time before they came into the actual possession of the vendee, and Stubbs *v.* Lund was fully approved of. On the other hand, the supreme court of Pennsylvania in the case of Bolin *v.* Huffnagle, 1 Rawle, 9, after full and learned arguments, held the distinction above taken to be incorrect and unsupported by authority. In Fowler *v.* M'Taggart, cited 1 East, 522, the broad proposition was laid down that a delivery of goods into a ship chartered by the vendee defeated the vendor's right to stop *in transitu*. It does not appear from the report of this case whether the goods were to be conveyed to the vendee, or to a third party, but in the subsequent case of Bohtlingk *v.* Inglis, 3 East, 381, it is said by the court that the goods were put on board not to be conveyed to the bankrupts, but that they might be sent by them on a mercantile adventure. This case

orders to another place, since they will never be any more in his possession than they are when on board, this terminates the

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is also cited by counsel in Hodgson *v.* Loy, 7 T. R. 440, 442. The ship was chartered by the bankrupts for three years, and the captain was hired and paid by them, so that they had the exclusive control of the vessel. In Inglis *v.* Usherwood, 1 East, 515, the general principle seems to have been admitted by all the judges that a delivery of goods by the vendors on board a ship chartered by the vendee, is the same as a delivery to the vendee. But the delivery in this case was made in Russia, and by a law of that country goods may be stopped in such a case. It was therefore held that the vendors had not lost their right of stoppage. And in Bochtlinck *v.* Schneider, 3 Esp. 58, it was held that the law of Russia not being provable by parol, the case stood on the general law, and therefore a delivery being made by the consignor on board the ship chartered by the consignee, the transitus was ended. But in the subsequent case of Bohtlingk *v.* Inglis, 3 East, 381, the question arising whether the vendors had acted in accordance with the law of Russia, the court laid that element out of the case, and held that, by the general maritime law, where a person in England chartered a vessel to go to Russia, and bring goods home from there, the delivery on board the vessel was not a final delivery, on the ground that they "were on their passage or transit from the consignor to the *consignee*." Thompson *v.* Trail, 2 Car. & P. 334, merely decides that a direction by the vendee to the vendor to send the goods by a particular ship, will not defeat the right of the latter to stop them. In Van Casteel *v.* Booker, 2 Exch. 691, goods were put on board the vessel at Rio bound "for Cork or a market," consigned to the bankrupts who were merchants at Liverpool, and owners of the vessel. Mr. Baron *Parke* said, that if the goods were put on board to be carried for and on the account and risk of the bankrupts "the delivery on board put an end to the right of stopping *in transitu*, for the delivery on the vendee's own ship, is a final delivery at the place of destination, especially where, as in this case, its final port of discharge was not then determined, and it required further orders at Cork to give the vessel its destination. On that supposition the goods were at their journey's end; for, it was not intended necessarily that they should ever come otherwise into the possession of the buyer than by being in that of the agent for carrying, the master." Mitchel *v.* Ede, 11 A. & E. 888, was decided on the ground that the ship was a general one. Turner *v.* Trustees of the Liverpool Docks, 6 Exch. 543, 6 Eng. L. & Eq. 507, is an important case on this point. There A. & Co., residing in Charleston, South Carolina, consigned cotton to B. & Co., living at Liverpool, and delivered it on B. & Co.'s own vessel at Charleston, taking a bill of lading to deliver to their order, or their assigns, they paying no freight, "*being owners' property.*" The consignors indorsed the bill to the "Bank of Liverpool or order." The consignees became bankrupt before the cotton arrived at Liverpool. The consignors, on its arrival, claimed a right to stop the cargo *in transitu*. The assignees in bankruptcy claimed the cotton, as having been completely vested in the bankrupts as soon as it was put on board their own vessel at Charleston, specially appointed by them to bring home such cargo. *Patteson*, J., said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or their assigns, and that, therefore, was not a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship. The vendors still reserved to themselves at the time of the delivery to the captain a *jus disponendi* of the goods which he, by signing the bill

transit.[1] We see no reason why the same rule should not apply to a ship which is chartered or hired by the buyer of the goods. If it appears, however, by the bill of lading, that the goods were put on board to be carried on account and at the risk of the consignee, this vests the property in him, and puts an end to the transit.[2]

If the buyer orders the goods to be sent to some other person, by any suitable conveyance, without designating any one espec-

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of lading, acknowledged, and without which, it may be assumed the vendors would not have delivered them at all." See also as to the right of the consignor thus to maintain his right of stoppage, Ellershaw *v.* Magniac, 6 Exch. 570, note; Wait *v.* Baker, 2 Exch. 1; Van Casteel *v.* Booker, 2 Exch. 691. Lord Chancellor *Lyndhurst*, *In re* Humberston, 1 DeG. 262, seems also to have been of opinion, that a delivery on board the vendee's own ship was in effect a delivery to him, although they were to be conveyed to the vendee.

[1] Fowler *v.* M'Taggart, cited in 1 East, 522, 3 East, 396. The distinction is also recognized in the cases cited in the preceding note, and fully supported in Rowley *v.* Bigelow, 12 Pick. 307, 314. The court there said: "We think it very clear, that a delivery of the corn on board of a vessel appointed by the vendee to receive it, not for the purpose of transportation to him, or to a place appointed by him to be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence and business to a third person, was a termination of the transit, and the right of the vendor to stop *in transitu* was at an end." See also, Noble *v.* Adams, 7 Taunt. 59.

[2] Wilmshurst *v.* Bowker, 7 Man. & G. 882; Van Casteel *v.* Booker, 2 Exch. 691, 708; Jenkyns *v.* Brown, 19 Law J., N. S., Q. B. 286; Key *v.* Cotesworth, 7 Exch. 595, 14 Eng. L. & Eq. 435. See also, Cowas-jee *v.* Thompson, 5 Moore, P. C. 165. In this case goods contracted to be sold and delivered "free on board," to be paid for by cash, or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill, which they accepted, was running, became insolvent. Under these circumstances it was held that trover would not lie for the goods, for that on their delivery on board the vessel they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. In Meletopulo *v.* Ranking, 6 Jur. 1095, 1 N. Y. Legal Observer, 299, one Sargint commissioned the plaintiff to purchase at different places a cargo of currants which were to be shipped at Vostizza for England. The currants arrived at Vostizza, and Sargint chartered a vessel and directed that they should be sent to the Messrs. Ranking. Sargint had an agent at Vostizza, who would have attended to the goods, but being sick, the plaintiff put them on board. The bill of lading, however, stated that they were shipped by the agent on account of Sargint. Lord Chancellor *Lyndhurst* held that this showed that the delivery to Sargint was complete.

ially, or by a designated carrier who is not specifically his agent or servant, the goods remain *in transitu*, until they reach that second person. For he is only as the buyer; or as a second buyer; and a second buyer, without possession, can no more defeat the lien of the seller than the first buyer.[1]

If the buyer orders the goods to be delivered on board a vessel named by him, to be carried to a distant consignee whom he names, it seems that if the seller takes a receipt from the ship-master as for his own goods, he preserves his own lien on them.[2] And if he demands such a receipt at the time of shipment, and it be not delivered, the seller acquires, by his mere demand, a right as against the master.[3]

D. *How the Lien of the Carrier affects this Right.*

A carrier of goods, by land as well as by sea, acquires a lien on the goods which he carries for the freight-money. If the carrier who owns the ship is also the buyer of the goods, this may give rise to cross liens. The ship-owner has a lien for the freight as against the seller. The seller has a lien for the price as against the ship-owner who is buyer. The law adjusts these cross liens thus. The ship-owner being in actual possession of the goods in his own ship, holds on to them until the freight is paid; but then the right and lien of the seller come into force. He may, by paying freight, acquire a right to the possession of the goods as his security; and cannot otherwise. If the ship-owner have died insolvent, or have transferred his assets to assignees, and with them the ship and cargo, the shipper of the goods, by tendering freight to the executor or administrator in the first case, or to the assignees in the second, may maintain an action of trover against them for the goods; but not otherwise.[4]

Usually the carrier is a third party, who stands in no particular relation to the goods, or to the buyer or seller. In such case his

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[1] Craven *v.* Ryder, 6 Taunt. 433; Dixon *v.* Yates, 5 B. & Ad. 313.
[2] Craven *v.* Ryder, 6 Taunt. 433.
[3] Ruck *v.* Hatfield, 5 B. & Ald. 632.
[4] Newhall *v.* Vargas, 15 Maine, 314.

lien for the freight creates no difficulty. Whoever claims the goods must pay him for carrying them; and it is immaterial to him whether buyer or seller does this. But a seller who seeks to stop the goods *in transitu*, is bound to pay the carrier only his freight for these very goods, and not his general demand against the buyer.[1] If the carrier holds them from the buyer by his lien for freight, while he holds them they are in transit, because not yet in the possession of the buyer. And where a carrier landed a part on the wharf of the consignee, but took it back again and held that part with the rest for his freight, it was held that this delivery did not extinguish the right of the seller.[2] Payment of freight by the buyer is not, of itself, sufficient to terminate the transit or to take away the right of stoppage.[3]

It may be added, that a carrier who agrees to look for his freight to the consignor, cannot detain the goods for freight, from the consignee.[4] And if he so detain them after a demand from a buyer or consignee otherwise entitled to the possession, we should say that this unlawful detention would no more continue the right of stoppage, than an unlawful delivery would defeat it.[5]

E. *When Goods are lodged in the Custom-house.*

Whether, if goods be lodged in the custom-house, or the national warehouse, the transit is ended before the duties are

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[1] Oppenheim *v.* Russell, 3 B. & P. 42.

[2] Crawshay *v.* Eades, 1 B. & C. 181; Edwards *v.* Brewer, 2 M. & W. 375.

[3] Thus, in Donath *v.* Broomhead, 7 Barr, 301, the consignee paid the freight, but, having lost the invoice, was unable to enter the goods at the custom-house, in consequence of which, they were seized by the officers and removed from the vessel. Before the duties were paid the consignee became insolvent, and the court held the *transitus* was not ended. See also, Mottram *v.* Heyer, 5 Den. 629.

[4] Butler *v.* Woolcott, 5 B. & P. 64.

[5] This seems to be the correct rule, and in a controversy between the vendor and the assignees of the bankrupt, it has been so held; Bird *v.* Brown, 4 Exch. 786, 797. See also, Naylor *v.* Dennie, 8 Pick. 198, 203, per *Parker*, C. J. But in Allen *v.* Mercier, 1 Ashm. 103, the court were of opinion that, in a case where the goods had arrived at the place where the vendee lived, and were demanded by him, he tendering freight, but the carrier refused to deliver them until an old claim was settled, and carried them back to the place where the vendor lived, the latter was entitled to maintain replevin against the carrier on tendering freight.

paid and every thing done which is necessary to give the consignee the right to withdraw them at pleasure, seems not to be certain on the authorities. We should say, on principle, that if the goods pass from the ship to the warehouse because the consignee has no right to them, not having paid the duties, or otherwise satisfied the requirement of law, it cannot be said that he has ever taken possession of them. And, therefore, the seller may discharge all these claims upon them and establish his lien for the price.[1] If the goods were ever delivered to the consignee, no subsequent taking of them from him by the government, or delivery of them by him to the government, can restore the lien of the seller; for that ceased entirely as soon as they came into possession of the buyer.

F. *Of Constructive Delivery of the Goods.*

In general, wherever a carrier enters into a new arrangement with the consignee, by which the carrier agrees to hold the goods

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[1] It was proved, in Northey *v.* Field, 2 Esp. 613, that twenty days were allowed after the ship's arrival to pay the duties, during which time the goods remained on board, and if not paid within that time they were taken to the king's cellars, and kept there three months and then sold, but the owner might have them at any time on payment of duties. The vendees became bankrupt after the ship's arrival, within the twenty days. The goods were removed to the cellars, and the day before the three months expired the agent of the consignors demanded them. Held, that the *transitus* was not ended, and the consignors were entitled to recover. Nix *v.* Olive, Abbott on Shipping, 538, and Burnham *v.* Winsor, U. S. D. C., Mass., 5 Law Reporter, 507, are to the same effect. In Donath *v.* Broomhead, 7 Barr, 301, the goods were not entered on account of the loss of the invoice. The court held, that the transit was not complete. Mottram *v.* Heyer, 5 Den. 629, 1 Den. 483, is an important case on this point. The defendants, merchants in New York, ordered, from the plaintiffs in England, a case of hardware. It arrived April 7, when the bill of lading was delivered and the freight paid. On the 9th the goods were *entered* at the custom-house, and carried from the ship to the public store. They were placed there by the custom-house officers, because the consignees had neglected to pay the duties and obtain a permit to land the goods, and were not there under any of the warehousing provisions of the revenue laws. While there, and before the duties were paid, the defendants became insolvent, and the plaintiffs demanded of them the goods. They refused to deliver them, and afterwards paid the duties and removed the goods to their own store. Chancellor *Walworth* was of the opinion, that the entry, without payment of the duties, was not a termination of the *transitus*, although he thought that if they had been placed in a public store under the revenue warehousing system, the right of the vendor would be gone. See also, as to this last point, Strachan *v.* Trustees of Knox, Court of Sessions, Scotland, 19 F. C. 253, Brown on Sales, 536.

as the property of the consignee and at his disposal, this is a termination of the transit.[1] All acts in reference to any such question must be open to explanation by coexisting circumstances. And the general question may be stated thus. Taking all the facts together, was the carrier, the warehouse-man, or wharfinger, or any other person having the actual possession of the goods, at the time of the intended stoppage *in transitu*, acting as the agent of the seller, or of the buyer; for if of the latter, the transit was terminated.[2] And a question having

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[1] Thus, in Whitehead *v.* Anderson, 9 M. & W. 518, 534, *Parke*, B., said: "A case of *constructive* possession is, where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him." In this case the court doubted whether the act of marking, or taking samples, or the like, without any removal of any part of the goods from the possession of the carrier, even though done with the intention of taking possession, would amount to a *constructive* possession, unless it was accompanied by circumstances, showing that it was intended that the carrier should keep possession of the goods as the agent of the vendee, and that he assented to the same. See also, cases cited in next note.

[2] Thus, in Allan *v.* Gripper, 2 Cromp. & J. 218, 2 Tyrw. 217, the goods were conveyed by a carrier by water, and deposited in the carrier's warehouse, to be delivered thence to the purchaser or his customers, as they should be wanted, in pursuance of an agreement to this effect between the carrier and the purchaser. This was the usual course of business between them. It was held, that the carrier became the warehouse-man of the purchaser, upon the goods being deposited there, and that the vendor's right of stoppage was gone. The case was likened to Foster *v.* Frampton, 6 B. & C. 107, 9 Dowl. & R. 108, where the vendee desired the carrier, for his own convenience, to let the goods remain in his warehouse until he received further directions; and also, took home samples of the goods; but before the bulk was removed he became insolvent: and it was held, that the right of stoppage was gone. See also, Rowe *v.* Pickford, 1 J. B. Moore, 526. Scott *v.* Pettit, 3 B. & P. 469, was decided on the same principle. Goods were sent from Manchester *directed* to the purchasers at London; but, in pursuance of a general order from the buyer to the seller, they were sent to the warehouse of the buyer's packer, and by the warehouse-man were booked to the buyer's account, and the warehouse-man unpacked them. The *transitus* was held at an end when the goods reached the warehouse. In Wentworth *v.* Outhwaite, 10 M. & W. 436, goods were sold by a merchant in Hull to a Mr. Weatherall of Mickley Mills, a place about thirty miles from Leeds. They were forwarded by railway to Leeds, and there placed in the warehouse of the defendants. The custom was for the warehouse-men, when goods arrived for the vendee, to give him notice, and he then sent his teams for the goods. Held, that the warehouse-men were the agents of the vendee, and a delivery at their warehouse was a delivery to him, so as to terminate the *transitus*. See also, Dodson *v.* Wentworth, 4 Man. & G. 1080. But in this country, under a precisely similar state of facts, it has been decided otherwise. Covell *v.* Hitchcock, 23 Wend. 611, 20 Wend. 167.

arisen in such a case, whether the intention of either party could be put in by evidence and considered, when that intention had not been communicated to the custodian, it was held, by the majority of the court, but against the important dissent of Lord Abinger, that such intention was admissible.[1]

Among other modes of terminating the transit by constructive delivery, may be mentioned a delivery of the key of the vendor's warehouse to the purchaser;[2] or a receipt by the vendor of rent for the use of his warehouse;[3] or demanding and marking the goods by an agent of the buyer, at the inn which they had reached at the end of the journey;[4] or the seller's permitting the goods to be resold, and marked by the second buyer;[5] and we apprehend that permitting a resale would alone be sufficient.

Any delivery of the goods to an agent of the buyer authorized to receive them, will terminate the transit or otherwise, according to the purpose for which they are received. If to be still sent forward to the buyer, the receiver is only an agent to continue the transit;[6] but if they are to rest where received, and remain there subject to the final disposal of the buyer, and, therefore, could not be held as on their way to him, such a reception would terminate the transit.[7]

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[1] James *v.* Griffin, 2 M. & W. 623.

[2] Per Lord *Kenyon*, C. J., in Ellis *v.* Hunt, 3 T. R. 464, 468.

[3] See ante, p. 343, note 1.

[4] Ellis *v.* Hunt, 3 T. R. 464.

[5] Stoveld *v.* Hughes, 14 East, 308.

[6] Thus, in Buckley *v.* Furniss, 15 Wend. 137, 17 id. 504, a party ordered a quantity of merchandise, directing it to be forwarded to an intermediate place. After it arrived it was delivered to a common carrier employed by the purchaser, but before it reached its final destination the vendor stopped it. Held, that there had been no delivery to the vendee. See also, Mills *v.* Ball, 2 B. & P. 457; Coates *v.* Railton, 6 B. & C. 422; Edwards *v.* Brewer, 2 M. & W. 375; Hause *v.* Judson, 4 Dana, 7; Cabeen *v.* Campbell, Sup. Jud. Ct., Penn., 1858, 6 Am. Law Register, 561. And the law is the same where the delivery is to a packer appointed by the buyer. Hunt *v.* Ward, 3 T. R. 467; Loesehman *v.* Williams, 4 Camp. 181. But if the warehouse of the packer is used by the buyer as his own, the law is otherwise. Scott *v.* Pettit, 3 B. & P. 469; Tucker *v.* Humphrey, 4 Bing. 516; Leeds *v.* Wright, 3 B. & P. 320.

[7] Dixon *v.* Baldwin, 5 East, 175; Valpy *v.* Gibson, 4 C. B. 837; Leeds *v.* Wright, 3 B. & P. 320; Biggs *v.* Barry, 2 Curtis, C. C. 259.

G. *Whether the Consignee may hasten his own Possession.*

What possession of the vendee terminates the transit, has also been considered, in reference to constructive possession. An erroneous view of this subject seems to have prevailed for a while, in consequence of certain phrases, indicating that actual and personal possession alone could have this effect, which were used inconsiderately by judges of high authority. We apprehend, however, that no court would now hold that constructive possession might not have the full effect of actual possession.[1]

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[1] It was once said, by Lord *Mansfield*, in Hunter *v.* Beal, cited in Ellis *v.* Hunt, 3 T. R. 466, that goods must come to the *corporal touch* of the vendees, in order to terminate the transit. This expression, as applicable to the facts of that case, was perfectly correct, but it gave rise to the idea that the vendee could not take constructive possession of the goods. Lord *Kenyon* also seems to have been of the opinion that an actual possession was necessary. In Wright *v.* Lawes, 4 Esp. 82, he used the following language: "I once said, that, to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much." We have seen that a delivery to an agent of the vendee, if the goods are not to be forwarded, but to remain with the agent subject to the final disposition of the vendee, is a termination of the transit. And so is a delivery on the wharf of the vendee, though the vendor claim to stop them before the vendee takes possession of them. Sawyer *v.* Joslin, 20 Vt. 172. The goods, in this case, were shipped at Troy, N. Y., directed to the purchaser at Vergennes, Vt. They were landed upon the wharf at Vergennes, half a mile from the purchaser's place of business. The wharf was the place where his goods were usually landed, and it was not customary for the wharfinger, or the carrier, or any one of them, to have any care of the goods after they were landed; but the consignee was accustomed to transport the goods from the wharf to his place of business, as was also the custom with other persons having goods landed there. The goods, while on the wharf, were not subject to any lien for freight or charges. It was held, that a delivery on the wharf was a constructive delivery to the vendee, and that the right of stoppage was gone when the goods were landed. The cases on this point were thus classified by *Hall*, J., who delivered the opinion of the court: "The cases cited and relied upon by the plaintiff's counsel, where the transit was held not to have terminated, will, I think, all be found to fall within one or the other of the following classes: 1. Cases in which it has been held that the right of stoppage existed, where the goods were originally forwarded on board of a ship chartered by the vendee. 2. Where the delivery of the goods to the vendee has been deemed incomplete, by reason of his refusal to accept them. 3. Where goods remained in the custom-house, subject to a government bill for duties. 4. Where they were still in the hands of the carrier, or wharfinger, as his agent, subject to the carrier's lien for freights. 5. Where the goods, though arrived at their port of delivery, were still on shipboard, or in the hands of the ship's lighterman, to be conveyed to the wharf. 6. Where the goods had performed part of their transit, but were in the hands of a middleman, to be forwarded on by other carriers."

A question has arisen whether a consignee, by taking possession of the goods prematurely, could terminate the transit and with it the right of the seller, earlier than it would otherwise cease. And it was held, that he could not.[1] But it must be difficult to lay down any rule on this subject, which must not depend greatly upon the particular facts of a case. For, on the one hand, no consignee should be permitted by a fraudulent anticipation of delivery to deprive the buyer of a right which he was preparing to exercise with all due diligence and in the usual and proper way; on the other hand, it cannot be maintained that a consignee may not fairly exert himself to the utmost to hasten the arrival of goods which he wishes to use in his business, and that the consignor, when he sends them, has a certain time allowed him for his stoppage *in transitu*, which is predicated upon the usual course of transit, and is independent of the buyer's position. It has never been supposed that a seller would lose his right at a certain time, when the goods ought to be in the hands of the buyer, whether they were so or not.[2]

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[1] Holst *v.* Pownal, 1 Esp. 240. The ship, in this case, arrived at Liverpool on the 9th of June, but being obliged to perform quarantine she was ordered back to a place called Hoylake, for that purpose. The same day the assignee of the vendee went on board and claimed the cargo, opened some chests of oranges, and put two persons on board to maintain possession. On the 17th of June the goods were claimed by an agent of the vendor. On the 18th the quarantine was ended and the ship came into harbor, and on the 19th the cargo was delivered to the assignees. Lord *Kenyon* held, that the voyage not being completed the right of stoppage remained, and the defendants had no right to claim possession till the end of the voyage.

[2] Wright *v.* Lawes, 4 Esp. 82; Mills *v.* Ball, 2 B. & P. 457, 461; Oppenheim *v.* Russell, 3 B. & P. 42, 54. In Holst *v.* Pownal, 1 Esp. 240, there was a bill of lading which may have influenced Lord Kenyon's decision, as in Wright *v.* Lawes, *supra*, where there was no bill, he decided that the vendee could take possession of the goods before they arrived. But Mr. Baron *Parke*, in James *v.* Griffin, 2 M. & W. 623, 633, speaking of these two cases, said: "It is somewhat difficult to understand how a bill of lading, which is only a contract between the vendee and shipper for the carriage, can make any difference." See also, Jones *v.* Jones, 8 M. & W. 431; Foster *v.* Frampton, 6 B. & C. 107. In Wood *v.* Yeatman, 15 B. Mon. 270, one Davis, of Tennessee, went to Philadelphia and bought goods of the plaintiff with the fraudulent design of never paying for them. The goods were packed in boxes, marked with his name and address, as well as with the names of the vendors, and forwarded by the usual conveyance to Jacob Forsythe, Jr., a commission merchant at Pittsburg, on their way to Tennessee. At Pittsburg they were attached by a creditor of Davis for a debt of $1,000. Davis, who was there, induced the defendant to relieve the goods from this attachment, by accepting a draft at sixty days for the amount of the debt, which was cashed by Forsythe, and the attachment discharged. As an indemnity, Yeatman ex-

H. *Of the Delivery of a Part of the Goods.*

Whether a delivery of a part of the goods terminates the transit as to all, has also been questioned. We should lay down the rule thus. If the purchase be made by a contract consisting of severable parts, and not in itself entire, a delivery of one of these parts would not terminate the transit as to the others. If the contract were entire, the delivery of a part would terminate the transit as a delivery of the whole, unless it could be shown that the intention was to sever that part and deliver it by itself.[1]

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acted that the goods should be delivered to the house of Forsythe & Co., and by them forwarded to him at Nashville, and refused to accept the draft unless this was done. The goods were therefore delivered over to that house and by them shipped to a firm in Smithland, an intermediate port, where goods are usually reshipped up the Cumberland to Nashville. On the 21st of October, 1851, Yeatman attached these goods at Smithland, on allegations of fraud against Davis, and subsequently Wood caused attachments to be levied on the same goods, asserting his right to stop them *in transitu*. The court held, that the acts of Davis were tantamount to an actual assumption of possession and delivery to Yeatman, and that the right of the consignor to stop them *in transitu* had ceased. It was held, in Jackson *v.* Nichol, 5 Bing. N. C. 508, that although a reception by the vendee of the goods while on the journey, would operate as a termination of the transit, yet that a mere demand by the vendee without any delivery would not have this effect. So in the late case of Secomb *v.* Nutt, 14 B. Mon. 324. The vendor, at Wilmington, N. C., shipped goods to the house of Marsh & Rowlett of New Orleans, to be by them forwarded to the vendee at Cincinnati. The vendee directed M. & R. to sell the goods if a certain price could be obtained, and they accordingly sold a portion, but being unable to obtain the required price for the rest, shipped it to the vendee. It was contended that the order given to M. & R. put an end to the transit, and that it changed the character of M. & R. from that of mere forwarders to that of special agents for the vendee, and that the latter, by giving the order, assumed a control, and acquired a dominion over the whole which was equivalent to taking possession. But the court held, that, although the transit had ceased as to the goods sold, yet the vendor had a right to stop the others. It was admitted that the vendee might have taken possession before the end of the journey, but the court said: "The intermediate act of the vendee must be such as produces an actual and substantial or physical effect upon the condition and destination of the goods."

[1] The first case in which this subject was broached, was Slubey *v.* Heyward, 2 H. Bl. 504. The sale was of 7,061 bushels of wheat, the whole of which was entered by the consignees at the custom-house, and 800 bushels taken away before the vendor attempted to stop the remainder. The court held, that there had been a delivery of the whole, there being no intention on the part of the consignees to separate the part taken from the rest. And in Hammond *v.* Anderson, 4 B. & P. 69, the delivery of part was held to be a delivery of the whole. The vendor and vendee lived in the same town, and the goods (bacon in bales), lay at the wharf of a third person. They were sold for an entire price to be paid for by a bill at two months. The vendee, having received an

I. *Of the Effect of the Bill of Lading on this Right.*

The effect of the bill of lading upon the right of a seller to stop the goods *in transitu*, is very important. It was once quite uncertain; but we apprehend that the course of adjudication and the principles which the law-merchant would bring to bear upon this question, enable us to state with some certainty, the American law on the subject.

The bill of lading may be regarded as only a receipt which the carrier gives for the goods; and then it would have but little effect upon the right of stoppage. But the law-merchant regards it as much more than this; as an important maritime document; and we should say as a muniment of title generally, carrying prop-

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order for the delivery of the property, went to the wharf, and weighed the whole, and took away part. See also, Jones *v.* Jones, 8 M. & W. 431. In Wentworth *v.* Outhwaite, 10 M. & W. 436, several parcels of goods were purchased under one entire contract from a party at Hull, by the consignee living at Mickley, about thirty miles from Leeds. A part — two packages — was forwarded by the railroad to Leeds, and arrived there. One of these was taken by the consignee to Mickley, and the other seized by the sheriff at the suit of a creditor of the vendee. Some other parcels, comprised in the same contract, which were forwarded by water carriage to Boroughbridge, were stopped *in transitu*. The sheriff brought an action of trover to recover these parcels, on the ground that the right of the vendors was gone, there being a part delivery, but the court held, that the transit had not terminated. In Tanner *v.* Scovell, 14 M. & W. 28, goods were shipped for London, and were landed at a wharf and entered on the wharfinger's books in the *consignor's* name. The vendee had obtained a delivery order, under which he had received and sold the greater part. The court held, that as to the rest the right of stoppage existed. So in Hanson *v.* Meyer, 6 East, 614, the vendor sold all his starch lying at the warehouse of a third party at so much per cwt. The warehouse-man was directed to weigh and deliver it to the vendee. It was held, that a part having been weighed and delivered, the right of stoppage existed as to the residue. See also, Simmons *v.* Swift, 5 B. & C. 857. Miles *v.* Gorton, 2 Cromp. & M. 504, was an action by the assignees of a bankrupt against the vendor. The goods sold consisted of twelve pockets of Kent hops and ten pockets of Sussex. An entire price was given. The goods remained in the warehouse of the vendors. The vendee resold the ten pockets of Sussex hops, and delivered them to the sub-vendee. The other twelve remained in the warehouse of the vendors till after the vendee became bankrupt. Held, that on these the vendor had not lost his lien. See also, Dixon *v.* Yates, 5 B. & Ad. 313; Bunney *v.* Poyntz, 4 B. & Ad. 568. In Secomb *v.* Nutt, 14 B. Mon. 324, a part of the goods was sold while on the journey by the order of the consignee. Held, that the original vendor had a right to stop the residue. See also, Buckley *v.* Furniss, 17 Wend. 504. There is a *dictum* of Mr. Justice *Taunton*, in Betts *v.* Gibbens, 2 A. & E. 57, 73, 4 Nev. & M. 64, 76, to the effect that a partial delivery is *primâ facie* a delivery of the whole. But the correctness of this doctrine has been denied. See Tanner *v.* Scovell, 14 M. & W. 28, 37.

erty with it, and as itself a negotiable instrument. This the common law does not allow. It seems to have settled down, after some fluctuation, into the doctrine, that it is not properly speaking negotiable, but only *quasi* negotiable.[1] If by this is meant that the assignee cannot bring an action on it in his own name, but must bring the action in the name of his assignor, who is the original consignor, and that the action so brought shall be subject to no other defences than could be made if it were brought in the name of the assignee, there is no great practical harm in it. But the English courts have doubted, to say no more, whether a transfer by indorsement of the bill of lading for value, was, or operated as, an actual transfer of the goods.[2]

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[1] Though bills of lading have sometimes been called negotiable instruments, as in Berkley *v.* Watling, 7 A. & E. 29, Bell *v.* Moss, 5 Whart. 189, 205, yet the law may now be considered as settled that they are only *quasi* negotiable. See Gurney *v.* Behrend, 3 Ellis &. B. 622, 25 Eng. L. & Eq. 128, 136, and cases cited ante, p. 138, n. 3.

[2] Evans *v.* Marlett, 1 Ld. Raym. 271, 12 Mod. 156, 3 Salk. 290, is one of the earliest cases in which this subject is mentioned. *Holt*, C. J., there said: "The consignee of a bill of lading has such a property that he may assign it over." *Shower* also said that it had been adjudged so in the Exchequer. Lord *Mansfield*, in Wright *v.* Campbell, 1 W. Bl. 628, 4 Burr. 2046, said: "If the goods are *bonâ fide* sold by the factor *at sea* (as they may be, where no other delivery can be given), it will be good, notwithstanding the statute of 21 Jac. 1, c. 19, the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee; because the goods were sold *bonâ fide* and by the owner's own authority." The court, being of opinion that there were circumstances tending to show that the assignment was fraudulent, ordered a new trial to determine that fact. See also, Caldwell *v.* Ball, 1 T. R. 205; Hibbert *v.* Carter, 1 T. R. 745. The leading case on the subject is Lickbarrow *v.* Mason. The facts of this case were as follows: Messrs. Turing & Co. merchants at Middlebourg, shipped the goods in question for Liverpool by the order and on the account of one Freeman of Rotterdam, and drew bills of exchange on him for the price. The master of the ship signed four bills of lading for the goods in the usual form unto order or assigns; two of which were indorsed by Turing and Son in blank, and sent to Freeman together with an invoice of the goods. Another bill was retained by Turing and Son, and the remaining one kept by Holmes. The two bills of lading which were sent to Freeman he handed over, with the invoice, in the same state in which he received them, to the plaintiffs, that they might sell the goods on his account, and drew bills of exchange upon them for nearly the amount. Both sets of bills were accepted by Freeman and the plaintiffs respectively, but before the ship arrived Freeman became a bankrupt, and absconded, and Turing & Son sent another bill of lading to the defendants, who thereby obtained possession of the goods from the master. The Court of King's Bench, 2 T. R. 63, decided that the indorsement of the bills of lading being *bonâ fide*, and for a valuable consideration to one who had no notice that the goods had not been

Bills of lading so generally contain the word "assigns," or the word "order," that we assume this to be a part of them.

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paid for, operated as an actual transfer of the property, so as to divest the consignor of his right of stoppage *in transitu*. On appeal to the Exchequer Chamber, this decision was reversed by Lord *Loughborough*, 1 H. Bl. 357. The case was then removed into the House of Lords, where the judgment of the Exchequer Chamber was itself reversed and a *venire de novo* awarded. 2 H. Bl. 211, 5 T. R. 367. The able opinion of Mr. Justice *Buller* before the House of Lords is reported in 6 East, 21, note. On the second trial the jury found a special verdict, on which the Court of King's Bench declined giving any opinion, as it was understood that the case was to be carried up to the House of Lords; they stated, however, that they were of the same opinion as in the former case. 5 T. R. 683. If a writ of error was brought, it was probably abandoned, as no further report of the case appears. See also, Salomons *v.* Nissen, 2 T. R. 674; Haille *v.* Smith, 1 B. & P. 563; Jenkyns *v.* Usborne, 7 Man. & G. 678, 699; Pennell *v.* Alexander, 3 Ellis & B. 283, 24 Eng. L. & Eq. 132. In Newsom *v.* Thornton, 6 East, 17, 41, Lord *Ellenborough*, C. J., said: "A bill of lading indeed shall pass the property upon a *bonâ fide* indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. *But it cannot operate further.*" And Mr. Justice *Lawrence* in the same case added: "In Lickbarrow *v.* Mason, *some* of the judges did indeed liken a bill of lading to a bill of exchange, and considered that the indorsement of the one did convey the property in the goods in the same manner as the indorsement of the other conveyed the sum for which it was drawn. But in the Exchequer Chamber there was much argument to show that, *in itself*, the indorsement of a bill of lading was no *transfer* of the *property*, though it might operate as other instruments as *evidence* of the transfer." And in Gurney *v.* Behrend, 3 Ellis & B. 622, 25 Eng. L. & Eq. 128, 136, Lord *Campbell*, C. J., said: "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bonâ fide* transferree for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bonâ fide* transferree for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." In this country it is well settled that the bill of lading is *quasi* negotiable only. Thus in Everett *v.* Saltus, 15 Wend. 474, *nom.* Saltus *v.* Everett, 20 Wend. 267, the master of a vessel in which goods were shipped, fraudulently reshipped them at an intermediate port, and obtained a bill of lading for them which he transmitted to his agents, who sold the goods and indorsed over the bill of lading to the vendee, who acted *bonâ fide*. Held, that the original owner was entitled to the goods. See also, generally, Stubbs *v.* Lund, 7 Mass. 453; Peters *v.* Ballistier, 3 Pick. 495; Rowley *v.* Bigelow, 12 Pick. 307, 314; Stanton *v.* Eager, 16 Pick. 467; Chandler *v.* Sprague, 5 Met. 306, 308; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 445; Chandler *v.* Belden, 18 Johns. 157; Walter *v.* Ross, 2 Wash. C. C. 283; Ryberg *v.* Snell, 2 Wash. C. C. 294; Dawes *v.* Cope, 4 Binn. 258; The Schooner Mary Ann Guest, Olcott, Adm. 498, 1 Blatchf. C. C. 358; Winslow *v.* Norton, 29 Maine, 419. But if the bill of lading be transferred and indorsed by way of pledge to secure the consignee's debt, the consignor does not lose his right to stop the goods *in transitu*, but holds it subject to the rights of the pledgee. That is, he may

These words, alone, would not suffice to make them negotiable instruments. But the nature and use of the instrument, and the mercantile practice under it, and the unreasonableness of depriving a consignee and buyer of all power of effectually selling his goods "to arrive," or when they are at sea (which can only be done by transfer of the bill of lading), all these considerations lead us to regret that there has not been a fuller recognition of the negotiability of the bill of lading. In despite of Lord *Loughborough's* elaborate argument,[1] it seems to be very nearly as desirable that the bill of lading should be considered in all respects negotiable, as that bills and notes to order should be.

The bill of lading is made sometimes to the consignor or his order, or his assigns; sometimes to the consignee or his order or assigns. If transferred without indorsement, we should say it carried no title to the property; the mere possession of it not having any more effect than the mere possession of unindorsed promissory paper.[2] And if indorsed specially, the indorsee would be bound by the limitation, and any one to whom he transferred it would be bound also.[3]

But if it were made to the consignee or his order or assigns, and the consignor sent it to him; or if it were made to the consignor and his order or assigns, and the consignor indorsed it either in blank or to the consignee, and sent it to him in that state, then we should say that the consignor or seller, had put into the hands of the consignee or buyer, a muniment and evidence of property, transferable in itself, and justifying a third party without notice in believing that the consignee had a right

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enforce his claim to hold the surplus of the value of the goods, after the pledgee's claim is satisfied; and he holds this surplus to secure the debt of the consignee to him. And if the consignee has pledged some of his own goods together with those of the consignor, the latter would have a right to insist upon the appropriation of all the consignee's own goods towards the claim of the pledgee, before any of the goods contained in the bill of lading. *In re* Westzinthus, 5 B. & Ad. 817. The consignor is only bound to tender to the pledgee the amount of the specific advances made on the particular bill of lading, and is not liable for a general balance of account. Spalding *v.* Ruding, 6 Beav. 376.

[1] Lickbarrow *v.* Mason, 1 H. Bl. 357.

[2] Stone *v.* Swift, 4 Pick. 389; Walter *v.* Ross, 2 Wash. C. C. 283; Tucker *v.* Humphrey, 4 Bing. 516, per *Park*, J.

[3] Barrow *v.* Coles, 3 Camp. 92. So held also in the case of a bill of exchange. Lloyd *v.* Howard, 15 Q. B. 995, 1 Eng. L. & Eq. 227. See also the authorities cited in a note to this case, p. 230, 231.

to make an absolute sale of the goods to him.[1] We therefore conclude that a consignee who sells the goods for value to arrive and indorses over the bill of lading, confers upon the purchaser a title and property which destroy the right of the seller of the goods to stop them *in transitu*.

To this rule, however, there is this important qualification. If the party buying from the consignee knows that the sale is in fraud of the original seller, it is voidable by that seller of course. And if he knows that the consignee is, or is about to become, insolvent, this knowledge would, we think, have the same effect. That is, it would in fact be conclusive evidence of a knowledge on his part of the consignee's fraud. But if the consignee was aware of his own insolvency, and even of an intended stoppage *in transitu*, and sold the goods to prevent this, unless the purchaser had some knowledge, or adequate means of knowledge, of this fraud, he should not, on the general principles of sale and transfer, be affected by it.[2] It is not enough that the sub-vendee have notice or knowledge that the goods have not been paid for, but he must have notice or knowledge of circumstances which rendered the bill of lading not properly assignable.[3]

It has already been remarked that a consignee who has not this power, has in fact no practical power of sale; and the interests of commerce would be importantly interfered with by any such deprivation. For if he could, without this power, make a contract for the sale of the goods while at sea, this contract would be subject to his ultimate power of receiving the goods; and, this being uncertain, the consignee could not get his pay. The contract to sell would be avoided, so far as the sale was

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[1] A delivery is also necessary. Buffington *v.* Curtis, 15 Mass. 528; Low *v.* De Wolf, 8 Pick. 101; Allen *v.* Williams, 12 id. 297, 300; Gurney *v.* Behrend, 3 Ellis & B. 622, 25 Eng. L. & Eq. 128.

[2] Salomons *v.* Nissen, 2 T. R. 674.

[3] Cuming *v.* Brown, 9 East, 506, Lord *Ellenborough*, C. J., in this case stated the law as follows: If the plaintiff "had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that, being accepted, it was not likely to be paid; in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop *in transitu*, and would, therefore, have been unavailable to the party taking an assignment of the bill of lading under such circumstances, and for such purpose." See also, ante, p. 361, note 3.

concerned, by a stoppage *in transitu*, which should prevent the consignee from getting the goods into his possession and power. And no prudent merchant would pay down his money or give his negotiable paper on any such contingency. But it would be otherwise, as every day's practice shows, if the consignee could make a present and effectual sale of the goods, with actual transfer of the property in them, by his indorsement and transfer of the bill of lading. And we cannot doubt that the principles of the law-merchant would give him this power.

If the consignee be a factor only, he has the goods only to sell them for his principal; and, therefore, has no authority to pledge them.[1] But if the consignor has sent to his factor the usual and unrestricted bill of lading, has he not clothed him with the *indicia* of authority, and can he be permitted to deny the authority itself? This question has been somewhat agitated both here and in England. As the result of adjudication, there and here, it seems to be settled that a factor cannot pass the property of the goods by his indorsement and transfer of the bill of lading, by way of pledge to a party who did not know that the goods were not the factor's.[2] Statutes in England,[3] and similar

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[1] This point was first decided in the case of Paterson *v.* Tash, briefly reported 2 Stra. 1178, as follows: "It was held by *Lee*, C. J., that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt." It is stated in Abbott on Shipping, p. 541, that there is reason to suppose that this case was incorrectly reported. See also, the argument of counsel in Newbold *v.* Wright, 4 Rawle, 195. However this may be, the law, as there stated, is now the well-settled doctrine of England and of this country. Daubigny *v.* Duval, 5 T. R. 604; Solly *v.* Rathbone, 2 M. & S. 298; Graham *v.* Dyster, 6 M. & S. 1; Baring *v.* Corrie, 2 B. & Ald. 137, 143; Kuckein *v.* Wilson, 4 B. & Ald. 443; Fielding *v.* Kymer, 2 Brod. & B. 639; Queiroz *v.* Trueman, 3 B. & C. 342; Greenway *v.* Fisher, 1 Car. & P. 190; Williams *v.* Barton, 3 Bing. 139; Stierneld *v.* Holden, 4 B. & C. 5; Selleck *v.* Smith, 3 Bing. 603. And in this country the law is the same. Kinder *v.* Shaw, 2 Mass. 398; Odiorne *v.* Maxcy, 13 Mass. 178; Hoffman *v.* Noble, 6 Met. 68, 74; Evans *v.* Potter, 2 Gallis. 13; Van Amringe *v.* Peabody, 1 Mason, 440; Kennedy *v.* Strong, 14 Johns. 128; Buckley *v.* Packard, 20 Johns. 421; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417, 429; Holton *v.* Smith, 7 N. H. 446; Newbold *v.* Wright, 4 Rawle, 195; Hewes *v.* Doddridge, 1 Rob. Va. 143; Bowie *v.* Napier, 1 McCord, 1; Benny *v.* Rhodes, 18 Mo. 147; Benny *v.* Pegram, 18 Mo. 191; Warner *v.* Martin, 11 How. 209, 226; Skinner *v.* Dodge, 4 Hen. & Munf. 432; Howard *v.* Macondray, Sup. Jud. Ct., Mass., Nov. T. 1856.

[2] Martini *v.* Coles, 1 M. & S. 140; Shipley *v.* Kymer, id. 484; Newsom *v.* Thorn-

[3] 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39.

laws in some of our States,[1] protect the transferree in such a case. And this legislation is in conformity with the practice of the

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ton, 6 East, 17. The case of Wright *v.* Campbell, 4 Burr. 2046, was decided on the ground that the transaction was a sale, and so within the scope of the factor's authority, and is not, therefore, contrary to the other decisions, as has been sometimes supposed.

[1] These statutes enact generally that any consignee, agent, or factor, having possession of merchandise with authority to sell the same, or having possession of any bill of lading, permit, certificate, or order for the delivery of merchandise with the like authority, shall be deemed the true owner thereof so as to give validity to the sale, disposition, or pledge of such merchandise, as security for any advances, negotiable paper, or other obligations given on faith thereof. Maine R. S. (1857), tit. iii. ch. 31; Mass. Stat. (1845), ch. 193, Stat. (1849), ch. 216; Rev. Stat. R. I. (1857), ch. 116; N. Y. R. S. (1830), ch. 179, p. 203; (1852), (Denio & Tracy's ed.), part II. ch. iv. tit. v.; Laws of Penn. (1834), ch. 470; Ohio Rev. Stat. (1844), (Swan's ed.), 278. By the statutes of some of the States the pledgee cannot retain the merchandise if he had notice that the factor was not the true owner, before he made the advances, for which the merchandise was pledged as security. But the third section of the 216th chapter of Stat. (1849), Mass., provides that the pledge shall hold good, "notwithstanding the person making such advances upon the faith of such deposit or pledge, may have had notice that the person with whom he made such contract was only an agent: *provided, however*, that this act shall give validity only to such contracts, and shall protect only such loans, advances, and exchanges, as shall be made in good faith, and with probable cause to believe that the agent making such contracts had authority so to do, and was not acting fraudulently therein, against the owner of such merchandise." If the merchandise was pledged to secure *antecedent* advances, the pledgee acquires no other right, or interest in the pledge than was possessed, or could have been enforced by the agent or factor, at the time of making the pledge. Maine R. S. ch. 31, § 2; Mass. Stat. (1839), ch. 216, § 4; Rev. Stat. R. I. (1857), ch. 116, § 3; N. Y. R. S. (1830), ch. 179, § 4; (1852), (Denio & Tracy's ed.), part II. ch. iv. tit. v.; Laws of Penn. (1834), ch. 470, § 4. Very few questions which have arisen under these statutes have been decided. In New York the third section of the act of 1830 provides that the factor shall be deemed owner, etc., "so far as to give validity to any contract made by such agent with any other person, for sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument, *or other obligation in writing, given by such other person upon the faith thereof.*" In Jennings *v.* Merrill, 20 Wend. 9, it was held, under this section, that, where goods were in the possession of the factor, a transfer of the invoice to the defendants *for indorsements to be made on the faith of it upon the paper of the factor* came within the statute. The statute of New York, 1830, was intended to protect advances and dealings made on the faith of ownership, and not on the faith of the possession of the paper title or the evidences of title. It was, therefore, held, in a case where this question arose, that where a person advanced money to a factor on the security of certain goods, he knowing at the time that they were the property of another person, he was not entitled to the protection of the statute. Stevens *v.* Wilson, 6 Hill, 512, affirmed 3 Den. 472. See also, Zachrisson *v.* Ahman, 2 Sandf. 68, 75. In this last case it was also held, that a general clerk of a merchant, part of whose duty it was to prepare and present bills of lading for signature on shipping property of his principal, had not such control of the

merchants of continental Europe,[1] and, as we think, with sound policy and the true principles of the law-merchant.

It is always to be remembered that the mere possession of the bill of lading does not give a property in the goods, unless it be a lawful possession, or unless the transferree is fully justified in believing it to be a lawful possession and has paid for the goods on that supposition.[2] Hence, if a master, who usually or perhaps always has one copy of the bill of lading for his own use and guidance, which he is not expected or indeed authorized to hand to any other person, do in fact give it to the consignee or other person, even if it be so indorsed as to be transferable by delivery, it confers no right or title upon the receiver of it.[3] But even such transfer, where the transferree has an equitable title to the goods otherwise, may strengthen it. And a mere deposit of the bill of lading, even if unindorsed, will create a lien on the goods for the amount paid on the security of the deposit; and this lien will prevail against the right of the seller to stop the goods *in transitu*,[4] but it does not destroy that right, for the seller, by discharging this lien, may take possession of the goods.

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bills of lading as constituted him a factor. An important case has also been decided under the first section of the same statute, which provides that "every person in whose name any merchandise shall be shipped shall be deemed the true owner, so far as to entitle the consignee of such merchandise to a lien," etc. Covill *v.* Hill, 4 Den. 323. It was there held, that this section was confined to cases where the goods are shipped by the owner or under his authority, in the name of another, and, therefore, where a person intrusted a quantity of lumber to another to be shipped, in the name of the bailor, to certain parties, and the bailee was to direct them to sell it in the name of the bailor, and remit the proceeds to him, it was held, that the bailee, by shipping the goods in his own name, could not confer upon the consignees any better title than he himself had. For decisions under the English statutes, see Monk *v.* Whittenbury, 2 B. & Ad. 484; Fletcher *v.* Heath, 7 B. & C. 517; Blandy *v.* Allan, 3 Car. & P. 447; Taylor *v.* Trueman, Moody & M. 453; Baring *v.* Corrie, 2 B. & Ald. 137; Evans *v.* Trueman, 1 Moody & R. 10; Close *v.* Holmes, 2 Moody & R. 22; Phillips *v.* Huth, 6 M. & W. 572; Taylor *v.* Kymer, 3 B. & Ad. 320.

[1] See 1 Bell, Comm. B. 3, pt. 1, ch. 4, § 4, art. 412, p. 388–394, 4th ed.

[2] See Gurney *v.* Behrend, 3 Ellis & B. 622, 25 Eng. L. & Eq. 128, 136; Covill *v.* Hill, 4 Den. 323.

[3] Walter *v.* Ross, 2 Wash. C. C. 283.

[4] Nathan *v.* Giles, 5 Taunt. 558. In Walter *v.* Ross, 2 Wash. C. C. 283, 289, Mr. Justice *Washington* states the law as follows: "The possession of a bill of lading to order, not indorsed; a promise by the shipper to indorse it, or to send a bill of lading; or perhaps even a letter of advice, stating the shipment to be to a particular person, may, as between these parties, and where the consideration is paid, give to the consignee an equitable title, sufficient to repel the right of the consignor to countermand,

While the transfer of an indorsed bill of lading for value, by one authorized to transfer it, will thus pass the property in the goods, it does not follow that the property cannot be vested in the consignee free from all lien, without the bill. For if one orders goods, and they are sent to him, but the consignor takes a bill of lading to himself and this is never indorsed nor transferred by him, yet if the master delivers the goods to the party who ordered them, the consignor has lost his right of stoppage;[1] and this even if a bill of exchange or a note, which was given for the goods, was dishonored.

SECTION IV.

HOW FAR THE EXERCISE OF THIS RIGHT MUST BE ADVERSE TO THE SELLER.

It is often said that the exercise of the right of stoppage by the seller must be adverse, or in opposition to, the buyer.[2] But we doubt whether this is quite accurate.[3] If a consignee who hears of goods sent to him and knows he cannot pay for them, sends word to this effect to the consignor, that he may stop them on their way, so that they may not pass into his assets, and the consignor, availing himself of the information, complies with the request, we should be unable to say, on any sound principle, that this might not be a lawful stoppage.[4] The cases to

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and even to defeat the legal right of the holder of the bill of lading, with notice of the circumstances."

[1] Coxe *v.* Harden, 4 East, 211.

[2] Siffken *v.* Wray, 6 East, 371, 380, per Ld. *Ellenborough*, C. J.; Ash *v.* Putnam, 1 Hill, 302; Abbott on Shipping, 514.

[3] In Naylor *v.* Dennie, 8 Pick. 198, 204, the court said: "We understand this doctrine to mean no more, than that the right of stopping *in transitu* cannot be exercised under a title derived from the consignee; not that it shall be exercised *in hostility* to him; for we find it laid down in the same case of Lane *v.* Jackson, and in Feise *v.* Wray, 3 East, 93, that the consignment may be refused, and that, even by the direction of the consignee, some stranger may be appointed to take possession of the goods for the consignor, though he may be absent, and if he consents afterwards, the rescinding of the sale is complete."

[4] See Atkin *v.* Barwick, 1 Stra. 165, 10 Mod. 432, Fortesc. 353; Salte *v.* Field, 5 T. R. 211; Richardson *v.* Goss, 3 B. & P. 119; Bartram *v.* Farebrother, 4 Bing. 579, 1 Dan. & Ll. 42; Scholfield *v.* Bell, 14 Mass. 40. In Dixon *v.* Baldwen, 5 East, 175,

which the rule, that this right of the seller must be adverse to the buyer, is usually applied, are really very different, and

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the goods were taken from the possession of the agents of the vendees by the vendor on giving an indemnity, he claiming a right to stop the goods *in transitu*. The court held that the *transitus* was at an end, but that the vendors were entitled to the goods, there being evidence that the vendee intended to resign his claim to them before becoming insolvent. James *v.* Griffin, 1 M. & W. 20, 2 M. & W. 623, is an important case on this subject. The vessel with the goods on board arrived at the port of London. The captain pressed the consignee to have them landed immediately. The consignee, therefore, sent his son with directions to have the goods landed at a wharf where he was accustomed to have goods for him landed, and kept until he could take them away for his customers. At the same time he told his son that he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were landed at the wharf and there stopped by the vendor. The assignees of the bankrupt brought an action against the wharfinger. The court held that the goods belonged to the vendor. In the opinion of the court the case turned on the point whether the acts done amounted to a taking possession of the goods by the bankrupt as owner, and the intention of the bankrupt was to govern. To prove this intention the declarations to the son were considered most material, though they were not communicated to the defendants. In Smith *v.* Field, 5 T. R. 402, it was said that though a contract of sale might be rescinded by the consent of vendor and vendee, yet where the vendee wished to return the goods, but the vendor commenced a suit upon the contract of sale, and attached the goods in the hands of the packer as the property of the vendee, this would be considered as an election by the vendor not to rescind. In Ash *v.* Putnam, 1 Hill, 302, the right of the vendor to take back his goods was put on the ground that the sale was rescinded, and so in most cases. In James *v.* Griffin, 2 M. & W. 623, it seems to be considered as a right of lien, though *Parke*, B., says it is unimportant to determine the point. See also, Naylor *v.* Dennie, 8 Pick. 198; Grout *v.* Hill, 4 Gray, 361. In Lane *v.* Jackson, 5 Mass. 157, the consignees, merchants in Boston, had ordered goods to be shipped them on credit by the plaintiffs' merchants in London. Before the arrival of the vessel the consignees became insolvent, and while in this condition received advice of the shipment, and one of the bills of lading. This they assigned by deed to one Bourne, directing him to receive the goods on their arrival, and dispose of them for the use of the plaintiffs, in consideration of the said consignees being unable to pay for them. Bourne covenanted to do the same. On the day the ship arrived, Bourne went on board, presented the bill of lading indorsed to him, and demanded the goods, which the master agreed to deliver unless he was legally prevented. All these acts were done without the knowledge or direction of the plaintiffs. The same day on which the ship arrived, the goods were attached by the defendant, a deputy sheriff, at the suit of a creditor of the consignees. They were subsequently replevied by the plaintiffs. The court admitted that an insolvent consignee might, before he received the goods, disagree to the consignment, and the assent of the consignor would be presumed, unless, within a reasonable time after notice given, he declared his dissent, or neglected to give notice of his assent. And that if the goods arrived before notice could be given to the consignor, any person, at the request of the consignee might receive and take care of them, until the consignor had notice, and that an intermediate attachment would not defeat this right. "For the insolvent consignee having refused to receive them, the goods are *in transitu*, and may be seized by the consignor while they continue *in transitu*. And on

come under a different principle. If a seller sends his goods to a buyer and the buyer receives them, and then seeks to restore them to the seller, or even if they are brought to the buyer and he refuses to take them, and then the question comes whether the seller can profit by this return or refusal of the seller, it is a question of *rescission*, and not of *lien;* and we have already seen that the right of stoppage *in transitu* belongs to lien and not to rescission. If the goods were actually received by the buyer, the seller's lien is at an end; and so we think it is if they come actually within his power and immediate reach, and he declines to take hold of them. And then comes the question whether he and the seller can agree to rescind the sale, and give back to the seller those goods, to which by the common law, the assignees of the buyer are entitled, leaving to the seller only his dividend with other creditors. This is not, we repeat, a question of lien, and therefore not strictly a question of stoppage *in transitu*. So far as it is a question of sale and rescission, it must be difficult to find a reason why goods which have come to the bankrupt lately, or very recently, should be returned to the seller, and goods received earlier only make a common fund for all the creditors.[1]

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his giving notice of his assent, within a reasonable time, to the disagreement of the consignee, the contract is rescinded *ab initio*, and nothing ever passed by it to the consignee." But the court were of opinion that these principles did not apply. They said: "But this case is different. The consignees undertake here to assign the goods, and authorize a sale thereof for the use of the consignor. This assignment is not a disagreement, but an affirmance of the contract: and we cannot presume that the consignor would consent to the appointment of a factor, with power to receive and sell. The authority of the factor is derived from the consignee, and necessarily supposes an interest in the goods. In our opinion the plaintiffs cannot support this action upon the ground that they had never parted with their property by the supposed disagreement of the consignees." — And if the goods are not attached, in such a case, the assignees of the bankrupt are entitled to them. Siffken *v.* Wray, 6 East, 371.

[1] After the goods have come into the possession of the vendee, it is clear that he cannot by sending them back give preference to one creditor over another, particularly where the intention to return them is not completed till after the bankruptcy. Harman *v.* Fishar, 1 Cowp. 117, Lofft, 472; Barnes *v.* Freeland, 6 T. R. 80. See also, Alderson *v.* Temple, 4 Burr. 2235; Siffken *v.* Wray, 6 East, 371. In Heinecke *v.* Earle, Q. B., 20 Law Reporter, 702, the vendee was in embarrassed circumstances when the goods arrived, and desired that they should not be landed, but they were put into his warehouse, and he wrote to the vendors that he should warehouse the goods for them if his business should stop. The vendors then wrote demanding the goods, and the vendee replied that he had consulted his solicitor, who informed him that they

SECTION V.

WHAT INSOLVENCY WILL GIVE THIS RIGHT.

It seems to be held that if the seller knew that the buyer was insolvent when he sent the goods, he cannot stop them afterwards.[1] This seems reasonable enough. But if the seller knew the insolvency, it is impossible to suppose that he would send them, in good faith, unless on some special ground of security, or at least of belief of payment. And if the transaction were honest, and this security failed and the belief passed away, we know not why the seller might not stop the goods. It has however been held that to give the vendor the right to stop the goods *in transitu*, the insolvency must take place between the time of the sale and the exercise of the right of stoppage. But we are not without much doubt whether this can be laid down as a positive and universal rule. For if there be such a rule, the mere fact of insolvency at the time of the sale, whether known or unknown to the vendor, would destroy the right of stoppage.[2]

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could not be returned. The property of the vendee was afterwards assigned to trustees, and the keys of the warehouse delivered to them. The court held that the transit was ended when the goods were first put in the warehouse, and that there was no valid and mutual rescission of the contract of sale. But see Grout *v.* Hill, 4 Gray, 361.

[1] Buckley *v.* Furniss, 15 Wend. 137.

[2] This question seems to have been first raised in Rogers *v.* Thomas, 20 Conn. 53. *Storrs*, J., there said: "The remaining inquiry respects the time when such insolvency must occur, in order to confer this right. On this point, we are of opinion, that it is not sufficient it exists when the sale takes place, but that it must intervene between the sale and the exercise of such right. It is well settled, that after the sale, and before the vendor has taken any steps to forward the property to the vendee, the former has a lien upon it, by virtue of which he may, on the occurrence of the insolvency of the latter, retain the goods in his possession, as a security for the price. This is a strictly analogous right to that of stopping them after they have been forwarded, and while they are on their way to the vendee, and depends on the same principles. And it may be here remarked, that the cases decided on the subject of that right of lien, confirm the views which we have expressed as to the meaning of insolvency as applied to the right of stoppage, after the *transitus* has commenced. The same equitable principle, which authorizes a retention of the possession, in the one case, and a recovery of it, in the other, would seem to authorize the latter, where the insolvency occurred after the sale and before the forwarding of the property. The right of stopping it after the

Only a vendor can stop the goods; for no one else has a lien for the price. But a foreign merchant, who in compliance with orders from here, sends goods, the price of which abroad he has paid or is responsible for, is a seller or consignor within the requirement of the law of stoppage *in transitu*.[1] And so is one who sends goods to be sold by the consignee on the joint account of the sender and the consignee.[2] And an alien enemy who sent goods to England under a British license was there permitted to stop them.[3] But one who is only a surety for the consignee to the consignor, in whatever form, whether as indorser, guarantor, or otherwise, cannot, as we have already said,[4] have any lien on the goods, and therefore has no right to stop them; even if they are sent through his hands. It might be in such a case, that he might otherwise obtain indemnity or security on the goods, as by attachment, if the circumstances permitted it; but not by a stoppage *in transitu*. Even if the sender has a lien on the goods, if it be not the lien of the seller for the

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transitus has commenced, may not, therefore, be limited to the case where insolvency occurs after it has left the possession of the vendor, but it may extend to cases where it occurred at any time after the sale. However that may be, we are clear that it must occur after the sale. In favor of this position there is the same argument, from an entire absence of authority against it, as was derived from that source on the point which we have just considered; and it applies with equal force. We find no decided case, in which the right in question has been sanctioned, excepting where the insolvency occurred subsequent to the sale. And although the language of the courts may sometimes seem to import, that the right exists, irrespective of the time when the insolvency took place, it is quite plain, that, applying their expressions to the cases they were considering, and which did not involve this point, they were not intended to have that construction. But in most of the decided cases on this subject, it will be seen that their language is most unequivocal, and in terms limits the right of stoppage to cases of bankruptcy or insolvency, occurring while the goods are *in transitu*, and of course after the sale." In this case the vendee was insolvent at the time of the sale, and had been so for a long time previous. Precisely the same state of facts existed, in this respect, in Buckley *v.* Furniss, 15 Wend. 137, 17 id. 504, but the vendor there was allowed to exercise his right, though it was thought that if the vendor knew the facts it would be different. This case was cited by counsel in Rogers *v.* Thomas, but was not noticed by the court. See also, Conyers *v.* Ennis, 2 Mason, 236, where no notice was taken of this distinction. It was unnecessary, however, to consider it, as there had been a delivery to the vendee. And see Biggs *v.* Barry, 2 Curtis, C. C. 259.

[1] See ante, p. 341, n. 1.

[2] Newsom *v.* Thornton, 6 East, 17.

[3] Fenton *v.* Pearson, 15 East, 419.

[4] See ante, p. 340, n. 3.

price, he cannot stop them; as if the sender had worked upon them and had a lien for the wages or payment for what he has done.[1] Indeed, no one can exercise the right of stoppage *in transitu* who has not a property in the goods.

Nothing but the insolvency of the buyer gives this right to the seller; and indeed it may be called a principle of maritime law, that a consignor cannot vary or interfere with a consignment once made, except on the ground of insolvency.[2] But this need not be legal or formal bankruptcy or insolvency; it is enough if the buyer cannot pay his debts.[3] The seller who stops the goods

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[1] Sweet *v.* Pym, 1 East, 4.

[2] Snee *v.* Prescot, 1 Atk. 245; The Constantia, 6 Rob. Adm. 321.

[3] In Rogers *v.* Thomas, 20 Conn. 54, Mr. Justice *Storrs*, on the meaning of the phrase insolvency, said: "The cases on this subject generally mention insolvency as one of the conditions on which the right of stoppage *in transitu* accrues; but they are wholly silent as to what constitutes such insolvency; and, therefore, its sense, as thus used, is to be gathered from the circumstances of the cases. For it is a term which is used with various meanings. In a technical sense, it denotes the having taken the benefit of an insolvent law; in the popular sense, a general inability to pay debts; and, in a mercantile sense, a stoppage of payment, or failure in one's circumstances, as evinced by some overt act. That a technical insolvency is sufficient to authorize the exercise of the right of stoppage *in transitu*, has always been conceded. That it is not indispensable for that purpose, is equally clear. Mr. *Smith*, in his Compendium of Mercantile Law, p. 549, n., expresses his belief, that merchants have very generally acted as if the right to stop goods was not postponed till the occurrence of insolvency in the technical sense, and pertinently adds: 'The law of stoppage *in transitu* is as old, it must be recollected, as 1670, on the 21st of March, in which year Wiseman *v.* Vandeput was decided; so that if *insolvency* is to be taken in a technical sense, the law of stoppage *in transitu* has been varying with the varied enactments of the legislature regarding it.' That stoppage of payment amounts to insolvency, for this purpose, is assumed in many of the cases. Lord *Ellenborough*, in Newson *v.* Thornton, 6 East, 17, places the right of the vendor to stop the property on the 'insolvency' of the consignee, where there had been only a stoppage of payment by the vendee, when notice was given to the carrier, by the vendor, to retain the goods. In Vertue *v.* Jewell, 4 Camp. 31, the terms used were, 'stopped payment.' See also, Dixon *v.* Yates, 5 B. & Ad. 313. We have been able to find no case in which the right of stoppage *in transitu* has been either sanctioned or attempted to be justified on the ground of the insolvency of the vendee, where there was not a technical insolvency, or a stoppage of payment, or failure in circumstances, evidenced by some overt act; and Mr. Blackburn, in his Treatise on the Contract of Sale, p. 130, where this subject is very minutely examined, says, that there seems to have been no such case; and adds, that although the text-books and *dicta* of the judges do not restrict the use of the term 'insolvent,' or 'failed in his circumstances,' to one who has stopped payment, there must be great practical difficulty in establishing the actual insolvency of one who still continues to pay his way; and as the carrier obeys the stoppage *in transitu* at his peril, if the consignee be in fact solvent, it would seem no unreasonable rule to require, that at the time the consignee

takes this risk on himself. The buyer, if not insolvent, can pay the price, or if they were sold on credit, secure it, and then claim the goods. And if the seller stopped them maliciously, or without actual belief of insolvency on good grounds, he would doubtless be answerable for any damages the buyer should sustain thereby. If the goods were to be paid for by acceptances or notes, and the buyer is willing to accept the bills or sign the notes, and is not insolvent, the seller cannot stop the goods.[1] But if a compliance with the terms of the sale is refused by the buyer, then the seller may refuse to deliver the goods, or, what is the same thing, stop them *in transitu*. It is in fact insolvency so far as he is concerned.

The seller's right to stop the goods cannot be defeated by any bargain between the consignee and his assignee;[2] or by any claim, or lien, or attachment of any other person.[3] It may be

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was refused the goods, he should have evidenced his insolvency by some overt act. Mr. Smith, in his work which has been mentioned, clearly favors the same view. Comp. Merc. Law, 130, n. Hence, it appears that the authorities and text writers furnish no support to the claim, that a mere general inability to pay debts, unaccompanied with any visible change in the circumstances of the debtor, constitutes insolvency, in such a sense as to confer the right of stoppage *in transitu*."

The rule generally laid down is, that a person is insolvent when he is not in a condition to pay his debts in the usual and ordinary course of trade and business. Shone *v.* Lucas, 3 Dowl. & R. 218; Bayly *v.* Schofield, 1 M. & S. 338; Biddlecombe *v.* Bond, 4 A. & E. 332; Thompson *v.* Thompson, 4 Cush. 127, 134. In Secomb *v.* Nutt, 14 B. Mon. 324, on the question whether the vendee was insolvent, the court said: "To establish insolvency it is not necessary to prove that he is not able to pay a cent, or any particular sum, but it is sufficient to show that he is unable to pay his debts. The true meaning and effect of the preference given to the vendor, while the goods sold on a credit are *in transitu*, is that he is relieved from the necessity of a race for priority, and of sharing with general creditors the proceeds of goods sold by himself. To save him from this scramble it is sufficient to show with reasonable certainty, that is, with probability, that the vendee is embarrassed and not able to make full or general payment of his debts. And it would seem that the vendee's own admission of the fact to his vendor would be sufficient to authorize the latter to act upon it, and should, unless disproved, sustain his claim, to stop the goods *in transitu*." In Hays *v.* Mouille, 14 Penn. State, 51, the vendee was indebted some $60,000, and his assets were only $26,000. His creditors were watching for the goods which the vendor had sold, and attached them while *in transitu*. The court held, that the jury were warranted in finding from these facts that the vendee was insolvent. See also, Naylor *v.* Dennie, 8 Pick. 198, 205.

[1] Walley *v.* Montgomery, 3 East, 585. See also, The Constantia, 6 Rob. Adm. 321.

[2] See ante, p. 362, note 2.

[3] Smith *v.* Goss, 1 Camp. 282; Le Ray De Chaumont *v.* Griffin, cited 15 Wend.

necessary for the seller to discharge the claim, as if it be a lien for freight;[1] but even this is not necessary, where the attachment is by a creditor of the buyer or consignee; for the seller's lien takes precedence. But if the goods have arrived at the journey's end, and are only prevented by the attachment from removal by the consignee, this may prevail, on the ground that the transit has ended and the lien gone.[2]

SECTION VI.

HOW THE RIGHT OF STOPPAGE MAY BE EXERCISED AND ENFORCED.

The insolvency of the buyer alone, however complete, or however manifested, will not operate as a stoppage *in transitu*.[3] The goods must be actually *stopped*, in some way which the law recognizes as adequate, by the seller or his authorized agent. It seems to have been supposed formerly, that an actual taking possession by the seller was requisite to complete this stoppage. That is now, however, not necessary; or, at least, not in all cases; although actual possession should always be taken if possible, and as soon as possible. And this right of taking possession is so complete that it justifies any mode of getting possession that is

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144; Buckley *v.* Furniss, 15 Wend. 137; Covell *v.* Hitchcock, 23 Wend. 611; Naylor *v.* Dennie, 8 Pick. 198; Hause *v.* Judson, 4 Dana, 7; Secomb *v.* Nutt, 14 B. Mon. 324; Wood *v.* Yeatman, 15 B. Mon. 270; Parker *v.* M'Iver, 1 Des. 274; Sawyer *v.* Joslin, 20 Vt. 172. But a conveyance by an insolvent debtor of goods, in trust, to pay the debt of a creditor, will not defeat an attachment made before he assents to the transfer; for the goods still remain the property of the debtor, and as such are liable to attachment. Lane *v.* Jackson, 5 Mass. 157, 163.

[1] See ante, p. 350, D.

[2] In Hitchcock *v.* Covill, 20 Wend. 167, *Nelson*, C. J., seems to have been of this opinion though the case was decided on another ground. If the goods have arrived at their place of destination, but before they are delivered to the vendee, they are attached by a creditor of his, and he takes no step to obtain the possession of them, the right of the vendor still remains. Naylor *v.* Dennie, 8 Pick. 198. But if, while they are attached, he takes such possession as he is able to, prior to the assertion of the right of the vendor, the *transitus* will be held to have terminated. Ellis *v.* Hunt, 3 T. R. 464.

[3] Haswell *v.* Hunt, cited 5 T. R. 231; Ellis *v.* Hunt, 3 T. R. 464; Scott *v.* Pettit, 3 B. & P. 469, 471; Mottram *v.* Heyer, 5 Den. 629.

not criminal.[1] But, as the goods may be secured against stoppage by passing into the constructive possession of the buyer, so they may be effectually stopped by the seller's acquiring a constructive possession of them. This is usually and properly done by giving notice to the carrier of the title and purpose of the seller, and forbidding him to deliver the goods to the buyer, and requiring him to give them up to the seller or his agent, or to hold them subject to his order. This notice should be given to the person who has actual possession of the goods.[2] If given only to the servant of the carrier, a question might arise whether this would be sufficient. We may suppose, for example, that a parcel sent by a carrier to a buyer had been delivered by the carrier to his porter, who was about to enter the buyer's home with it, when ordered by the seller's agent, of whom he knew nothing, not to deliver it. We should say, however, even in so extreme a case, that the buyer had succeeded in stopping the goods, and if there had been no negligence on his part, and the porter still went on and delivered the parcel to the buyer, that the seller would have a lien on them, and might, if they were not paid for, bring trover for them against the assignees of the buyer.

If notice is given to the principal and not to the servant, a different question may arise; and here it seems to be held, that a notice to the principal carrier is not sufficient, unless given in such way and at such a time, as to enable the principal carrier to send word to his servant not to deliver the goods.[3]

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[1] Snee *v.* Prescot, 1 Atk. 245, 250, per Lord Chancellor *Hardwicke.*

[2] Litt *v.* Cowley, 2 Marsh. 457, 7 Taunt. 169; Holst *v.* Pownal, 1 Esp. 240. In Bell *v.* Moss, 5 Whart. 189, notice given to the assignees of the consignee was held to be sufficient. But in Mottram *v.* Heyer, 5 Den. 629, 1 id. 483, the demand was made of the vendee before the goods were delivered to him, and while they were in the custody of the custom-house officers. This was held insufficient. In such a case notice should be given to the officers of the custom-house. Northey *v.* Field, 2 Esp. 613.

[3] Whitehead *v.* Anderson, 9 M. & W. 518, is an important case on this point. Timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire. Notice of stoppage was given to the ship-owner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor. This was held not to be sufficient. *Parke*, B., said: "To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given, as it was in the case of Litt *v.* Cowley, 7 Taunt. 169, at such a time, and under such circum-

If a notice be properly given to the carrier, it is his duty to comply with it. And if he does not, but actually delivers the goods to the buyer after such notice, this delivery does not defeat the right of the seller to stop the goods, if his demand was in all respects legal. The possession of the buyer is then unlawful, and will be held to be by construction of law the possession of the seller. And the carrier will be responsible to the seller for all the injury he may sustain.[1] Or, if the buyer becomes insolvent, and the goods pass into the possession of his assignees, the seller may bring an action of trover against the assignees.[2] And if the carrier, in whose hands the goods are duly stopped, delivers them to the buyer by mistake, the latter does not obtain such possession of the goods as will defeat the lien of the seller.[3] If, however, both parties claim the goods of the carrier, as of a ship-master, for example, he should ask an indemnity from the person whose claim seems to him best founded; if refused, he may ask an indemnity from the other party, and on that deliver it. There is no legal obligation imposed on either party to give such indemnity, but if circumstances warranted the master in asking it, and it was refused, and thereupon he refused to deliver the goods, the rightful claimant would doubtless recover them, or their value, but nothing, we think, by way of cost or damages for the detention. If the goods are in the custom-house, the seller may take possession by entering them as his own and paying or securing the duties.[4]

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stances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is, to use reasonable diligence to prevent the delivery; and in the present case such diligence was used."

[1] Wood *v.* Jones, 7 Dowl. & R. 126; Stokes *v.* La Riviere, cited 3 East, 397; Hunter *v.* Beal, cited 3 T. R. 466. See however, Mills *v.* Ball, 2 B. & P. 457, 462, per Lord *Alvanley*, C. J.

[2] Bohtlingk *v.* Inglis, 3 East, 381; Litt *v.* Cowley, 2 Marsh. 457, 7 Taunt. 169; and cases *passim*.

[3] Litt *v.* Cowley, 2 Marsh. 457, 7 Taunt. 169.

[4] Nix *v.* Olive, Abbott on Shipping, 538; *Ex parte* Walker, 1 Cooke's B. L. 394.

What the consignor may do personally, he may do by an authorized agent.[1] And if the demand be made by one who acts as agent but without authority, a subsequent adoption and ratification will have the effect of a previous authority, provided this be made before the goods are demanded by the buyer.[2] If made afterwards, it is said, it cannot give validity to the stoppage.[3]

On the continent of Europe generally, the right of stoppage *in transitu* is controlled, or rather made unnecessary, by the principle derived from the civil law, already referred to, which permits any creditor to take out of the debtor's possession, the goods which he sold, if they can be identified and separated, and the parcels have not been opened for sale, or the goods altered. But, in France, after some conflict, it seems to be settled that the law of stoppage *in transitu* is almost the same as our own.[4] There is, however, one provision of its code, not often called for, perhaps, in practice, but so manifestly just and reasonable, that it should be adopted here. It is that the estate, or the assignees of the purchaser of goods which the buyer has stopped and taken into

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[1] Holst *v.* Pownal, 1 Esp. 240; Whitehead *v.* Anderson, 9 M. & W. 518; Donath *v.* Broomhead, 7 Barr, 301; Mottram *v.* Heyer, 5 Den. 629. If an agent has it in his power to stop the goods but neglects to do so, he is liable in an action by the principal against him. Howatt *v.* Davis, 5 Munf. 34.

[2] Wood *v.* Jones, 7 Dowl. & R. 126; Newhall *v.* Vargas, 13 Maine, 93. See also, Nicholls *v.* Le Feuvre, 2 Bing. N. C. 81; Bailey *v.* Culverwell, 8 B. & C. 448; Bartram *v.* Farebrother, 4 Bing. 579. If one unauthorized takes possession of the goods before they reach the vendee, the question is *quo animo* he does it, whether as agent of the consignor, or of the vendee. Per *Parke*, B., James *v.* Griffin, 1 M. & W. 20, 29.

[3] Bird *v.* Brown, 4 Exch. 786. The persons who stopped the goods in this case were not even the general agents of the vendors. But in Newhall *v.* Vargas, 13 Maine, 93, a ratification, after the goods were demanded by the administrator of the consignee, who had died insolvent, was held to be effectual. The principle upon which the court proceeded in the case of Bird *v.* Brown, seems to us to be the more correct. It is that the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies. The court said: "In the present case, the stoppage could only be made during the transitus. During that period the defendants, without authority from Illins, made the stoppage. After the transitus was ended, but not before, Illins ratified what the defendants had done. From that time the stoppage was the act of Illins, but it was then too late for him to stop. The goods had already become the property of the plaintiffs, free from all right of stoppage."

[4] See ante, p. 336, n. 3.

his possession, shall be fully indemnified for all the costs and charges which they have properly incurred on account of them.[1] Indeed, this is only an unusual application of the same principle which the law-merchant already applies to stoppage *in transitu*, in reference to freight.

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[1] Code de Commerce, art. 579. "In case of stoppage *in transitu*, the vendor shall be bound to indemnify the estate of the insolvent for all advances for freight, or transportation, commission, insurance, or other charges, or to pay the sums due for these expenses if they have not been discharged."

CHAPTER XI.

OF THE DUTIES AND POWERS OF THE MASTER.

SECTION I.

OF THE FOUNDATION AND NATURE OF THE MASTER'S AUTHORITY.

THE master of a ship holds a peculiar and responsible position. As the owner is bound, in order that his ship may be sea-worthy, to put in command of her a master who is fully competent in respect of skill, care, and honesty, so the master is bound to all whose interests are under his charge, as owners of the ship, or hirers of it, or as owners of the goods, or even as insurers of the ship, goods, or freight, to use proper care and skill, and entire integrity in the protection and preservation of their interests. He must see to the lading of the goods on board; and take care that the dunnage, the stowage, and arrangement of the several articles are all that they should be. He must ascertain that the condition of the ship, as to her hull, rigging, and all appurtenances, and all provisions and supplies, is satisfactory. He must take on board and carefully preserve all such papers as the ship should carry and as fall within his duty. During the whole voyage he must conduct himself, not only under ordinary circumstances, but in all exigencies and emergencies, with due discretion, courage, and energy, and complete fidelity to his duties.

If the ship be wrecked, or in peril, or arrested, or captured, it is his duty to stay by her as long as any rational possibility exists that any good can be done by him, nor should he desert her until all hope has gone; to use the common phrase among seamen, "the captain should be the last man to quit the ship."

It is impossible to define all these duties, or state them in

detail. Some of them, and some of the most important among them, arise only on extraordinary occasions; and must be measured and defined by the circumstances of each case, and the exigencies which it presents.

In general, the established usage and custom of seamen, and the very nature of their duties, are the best, if not the only guide, in determining what they require. So too, this usage gives them certain privileges, which are always subject to bargain between the owner and master, but are generally very similar in similar ships. As the privilege of carrying goods for himself, or for others, in certain parts of the ship, he receiving the freight, or a right to a certain amount of tonnage.[1] So too he has his primage, which is a small percentage on the freight, and is a perquisite over and above his wages;[2] in this country it is, we believe, in foreign voyages, usually five per cent. After the voyage has commenced it seems that the owners have a right to change it reasonably and in good faith, and are then not liable to the master for all the wages or privileges previously stipulated for.[3] In a case where the master was to receive a certain sum per

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[1] King *v.* Lenox, 19 Johns. 235.

[2] Scott *v.* Miller, 5 Scott, 13, 15; 2 Molloy, ch. ix. s. v.; Charleton *v.* Cotesworth, Ryan & Moody, 175. And where goods, by the bill of lading, were to be delivered to the consignee, "he paying freight for the same as per charter-party, with primage and average accustomed," it was held that the master was entitled to receive primage from the consignee; although the contract between the ship-owner and the agents of the consignee (there being no charter-party) was for £5 per ton freight, and did not notice primage; and although the master contracted with the ship-owner to receive a sum certain, "in lieu of all cabin and other allowances, to commence from the day of victualling the ship, and for which he is to mess the officers." Best *v.* Saunders, Moody & M. 208. In Vose *v.* Morton, Sup. Jud. Ct., Mass., March T. 1856, 19 Law Reporter, 43, the bill of lading contained the usual clause, "with primage and average accustomed." Held, that *accustomed* qualified *primage* as well as *average*, and that evidence was admissible to show an universal and well-understood custom of the trade to pay no primage.

[3] Pawson *v.* Donnell, 1 Gill & J. 1. It was held, in this case, that if by the exercise of this privilege a special injury is done to either party, the ship-owner must bear the loss and make a reasonable indemnity; also, that if, by the change, the captain is necessarily discharged from the performance of all his duties, for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished, and that if part of the duties have been executed, then such a proportion of the stipulated compensation should be allowed as appeared just on comparing the services rendered with those which remained unperformed, and for the new part of the voyage the usual compensation should be paid, so that the parties should be placed in as nearly the same situation as possible, had a previous contract for the voyage as changed, been entered into between them. See also, ante, p. 86, notes 4 and 5.

month as wages and a commission of five per cent. and also a proportion of the profits, it was held that he could not traffic on his own account, for his own benefit.[1]

The powers of the master are not quite so indefinite, perhaps, as his duties. They rest upon certain ascertained principles, and are, for the most part, measured by exact rules. He is the agent of the owner; appointed by him, and by that appointment authorized to act as his agent in all matters which are fairly embraced within the scope of his appointment.[2] To know what this authority is, in general, or under any particular circumstances, we may appeal to the law of agency, and the principles of that law which are applicable to the particular case. Thus, the universal principle, that he who appoints another to do any thing for him, authorizes the person thus appointed to do whatever fairly and properly belongs to the doing of that thing, suffices for most of these questions. It is not, however, a rule equally universal, that authority to do a certain thing, always implies authority to do whatever can, in any emergency, become necessary for the doing of it. For, if circumstances should make an effort, expenditure, or sacrifice, necessary to the doing of the thing, which would certainly deter any reasonable man from doing it, the agent ought then to consider his authority as at an end.

Where the owner is himself present, or within easy access, that agency of the master which is founded on necessity disappears, for the necessity has ceased to exist.[3] We have seen that he may sell the ship when the sale is justified by a sufficient

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[1] Mathewson *v.* Clarke, 6 How. 122.

[2] But the master of a ship has no more authority to bind his owners than any other agent has to bind his principal. Pope *v.* Nickerson, 3 Story, 465, 475. He is not the general agent of the owners. Mitcheson *v.* Oliver, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, 232, per *Parke*, B.

[3] Lister *v.* Baxter, 2 Stra. 695; Arthur *v.* Barton, 6 M. & W. 138, 143, per Lord *Abinger*, C. B.; Ship Lavinia *v.* Barclay, 1 Wash. C. C. 49; Patton *v.* Sch. Randolph, Gilpin, 457; Johns *v.* Simons, 2 Q. B. 425; Beldon *v.* Campbell, 6 Exch. 886, 6 Eng. L. & Eq. 473. See also, post, § 4, C. "But this doctrine cannot be safely extended to the case of an owner *pro hac vice* in command of the vessel. Practically this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same power to borrow to meet that necessity, as if he were not charterer." Per *Curtis*, J., in Thomas *v.* Osborn, 19 How. 22, 29, deciding that the charterer has the power to bind the vessel for repairs though he may not have the power to bind the owners.

necessity ;[1] but no necessity can be sufficient if the owner were so near that the master was not obliged to act without his instructions.[2] And if a master is specially empowered to sell a vessel in a particular manner, his principal is not bound if he exceeds his authority, the vendee knowing that the master was specially authorized.[3]

In the same way he may do many things abroad, which he cannot do at home; as to raise money on bottomry,[4] charter the ship,[5] or repair or supply her extremity.[6] If the master is also

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[1] See ante, p. 59–65. But the master has no authority to sell part of a steamboat to a person for the purpose of keeping a bar. Kelly *v.* Dickinson, 15 Mo. 193.

[2] See ante, p. 64, notes 2 and 3.

[3] Johnson *v.* Wingate, 29 Maine, 404.

[4] See post, § 4.

[5] See ante, p. 231, note 3.

[6] As a general rule, in a foreign port, the master has authority to bind the owners for repairs, or supplies furnished the vessel, or to pledge the credit of the owners by raising money for necessary purposes. Hoskins *v.* Slayton, Cas. Temp. Hardw. 376 ; Rich *v.* Coe, 2 Cowp. 636 ; Speering (Speerman, in 2d ed.) *v.* Degrave, 2 Vern. 643 ; Stewart *v.* Hall, 2 Dow. 29 ; *Ex parte* Bland, 2 Rose, 91 ; Webster *v.* Seekamp, 4 B. & Ald. 352; Arthur *v.* Barton, 6 M. & W. 138, 143 ; Edwards *v.* Havell, 14 C. B. 107, 24 Eng. L. & Eq. 303; Milward *v.* Hallett, 2 Caines, 77, 81; Marquand *v.* Webb, 16 Johns. 89; The Aurora, 1 Wheat. 96; Abbott *v.* Balt. & Rapp. S. P. Co., 1 Md. Ch. 542 ; The Hilarity, Blatchf. & H. Adm. 90 ; The Gustavia, id. 189 ; Thomas *v.* Osborn, 19 How. 22, 28; Henshaw *v.* Rollins, 5 La. 335. See also, James *v.* Bixby, 11 Mass. 34. In Beldon *v.* Campbell, 6 Exch. 886, 6 Eng. L. & Eq. 473, it was held, that the master had not authority to borrow money to pay for work already done, and, therefore, where the ship, bound for Newcastle, was towed into that port, no agreement having been previously made that the towage was to be paid for immediately, and the master, six days afterwards, borrowed money to pay for the towage, it was held, that the owner was not liable. The tendency of the recent cases in England is to hold the person, furnishing necessaries to a vessel at the request of the master, to a strict proof that the latter was the agent of the owner sought to be charged. Thus, in Mitcheson *v.* Oliver, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, the action was for goods sold and delivered, for work and materials provided, etc. The defendant was, during the repairs, and afterwards, the registered owner of the ship. One Christie appeared on the register as master from August 7, 1850, until September 14, 1852. On the latter day the name of Thompson was substituted. The plaintiff proved that the repairs and articles furnished were necessary, that they were furnished from October 10, 1852, to November 17th, of that year. During that time Thompson was on board acting as master, and gave the orders for the repairs. The defendant showed that on the 14th of July of that year he entered into an agreement to sell the ship to one Gompertz on certain conditions, he to have the possession of the ship to fit her for a voyage to Australia. Thompson was appointed by Gompertz, and the repairs and supplies were furnished while in his possession. Subsequently, the conditions being broken, the defendant took possession of the vessel again. Held, that he was not liable. This case virtually overrules Frost *v.* Oliver, 2 Ellis & B. 301, 20

a part owner, he has authority to settle a claim for demurrage, and he would probably have this right if he were not a part owner.[1] Nor is it the *place*, which determines his power to do these things; for if he be abroad, and the owner be there also; or if an agent be there especially authorized and instructed by the owner upon these points, there is no *necessity* for the master's authority; and consequently it does not exist.[2] If, however, in a home port, and under the owner's eye, he makes contracts respecting the ship to which the owner assents in fact, or which he justifies the other contracting party in believing that he assents to,[3] or if he voluntarily accepts and retains the benefit

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Eng. L. & Eq. 114. And in Mackenzie *v.* Pooley, 11 Exch. 638, 34 Eng. L. & Eq. 486, it was held, that, where the vessel was sold after she sailed, the vendee was not liable for money borrowed by the master to buy necessaries, in a foreign port, although at the time the defendant was the registered owner. In England it seems now to be settled that the master has no power, in a foreign port, to create a lien on the vessel as security for the payment for repairs and supplies, except by a bottomry bond. Stainbank *v.* Fenning, 11 C. B. 51, 6 Eng. L. & Eq. 412; Stainbank *v.* Shepard, 13 C. B. 418, 20 Eng. L. & Eq. 547.

[1] Alexander *v.* Dowie, 1 H. & N. 152, 37 Eng. L. & Eq. 549.

[2] See ante, p. 380, note 3.

[3] In The Schooner Tribune, 3 Sumner, 144, the master of a vessel made a charter-party at a home port. It was held, under the circumstances, to be binding on the owners. Speaking of the power of the master, Mr. Justice *Story* said: "As to his right to make such a contract in the home port of the owners, I agree that it cannot be ordinarily presumed from his character as master. It is not an incident to his general authority; nor can it be presumed, under such circumstances, as an ordinary superadded agency. But there are peculiar circumstances, however, in the present case, which do create some presumption of such a superadded agency. In the first place, such had been his authority in the former voyages of the vessel; and such seems also to have been his authority under her subsequent employment. And I think it might fairly be presumed, that in the home port he would scarcely have had the rashness to make so important and definite a contract without some authority." And in The Flash, Abbott, Adm. 67, it was held, that the master may make an ordinary contract of affreightment at the home port. The learned judge, in the case of The Tribune, *supra*, was also of opinion that one of the owners, who was the ship's husband, must have had full knowledge of what the master had done. But it is not sufficient that the master acted with the privity of the owner unless he was his agent. Mitcheson *v.* Oliver, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219. And in Jordan *v.* Young, 37 Maine, 276, it was held, that the master of a vessel has no authority in a home port to order repairs, and that a vessel which is moored at the port adjoining that in which the owner resides is at her home port. But see Provost *v.* Patchin, 5 Seld. 235, where it is held that the master, as the general agent of the owners, has authority to bind them in a home port for necessary repairs, unless it can be shown that the owners themselves, or a ship's husband, managed the vessel, and that the party contracting with the master was aware of this.

of the contract when it is executed, when he is perfectly at liberty to return or renounce such benefit, in all such cases the owner is responsible, on general principles, as has been previously stated.

One general limitation of the power of the master to bind the owner by the contracts he makes for him, is this: they must relate to the condition, or the use and employment of the ship, and be within the usual duty and business of a master; and they must not be so unreasonable in themselves as to raise the suspicion that the contracting party acted fraudulently or recklessly in making them. By the general rule of the maritime law the master has the power to hire seamen, and the contract which he makes with them for wages is binding on the owners.[1]

If the master, while abroad, enters into a contract which binds the owner, that contract must be construed at home by the laws of the place where it was made, unless it is plain that it is to be executed at home, and under the home law.[2] But the master of a ship has the powers, as agent of the owner, which the laws of his own country give to him and no other, unless the owner expressly, or by some sufficient action, gives him more power or holds him out as possessing it.[3]

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[1] Some doubt has been expressed whether this rule applies to fishing voyages, but we think in the absence of a usage to the contrary the power of the master would be considered the same in voyages of this description as in freighting voyages. In Sherwood *v.* Hall, 3 Sumner, 127, and in Walcott *v.* Wilcutt, U. S. D. C., Mass., Boston Courier, May 29, 1858, it was held, that the owners of a whaling ship were liable for damages for the abduction of a minor by the captain, although they had no personal knowledge of the fact, the act being held to be within the scope of the authority of the master as agent of the owners. In Baker *v.* Corey, 19 Pick. 496, it was held, that the owners of a fishing vessel might hire men to navigate the vessel and to fish for the account of the owners, on wages instead of shares, and that although the master might not have this power *virtute officii*, yet if he were also a part owner, and the other owners did not interfere in the management of the vessel, he would be deemed their agent, and they would be bound by his acts.

[2] See 2 Parsons on Contracts, 94–100.

[3] Pope *v.* Nickerson, 3 Story, C. C. 465. The action in this case was assumpsit on four bills of lading. The question arose by what law the bills of lading were to be governed, whether by the law of Spain, where the contracts of shipment were made, or by the law of Pennsylvania, where the goods were to be delivered, or by the law of Massachusetts, where the owners resided, and to which the vessel belonged. The court held, that the laws of Massachusetts were to govern. See also, The Packet, 3 Mason,

The master has no power, as agent of the owner, to settle, or deal with any claims or questions that do not accrue or arise while he is master.[1] If the contracts which he makes are in his own name, then, it is said, that the owner cannot be made liable for them, on the contracts.[2] But most maritime contracts on which the owner should be liable, give to the contracting party a lien on the ship, and through this, the owner may be indirectly reached. And it may well be doubted whether, in this country, the owner himself might not, generally, be made directly responsible.[3] The master is, in almost all cases, where he makes a contract for his ship, himself responsible;[4] as on all charter-parties or bills of lading signed by him.[5] And if goods on board are injured by the unskilfulness or wrong doing of the master, or of the crew without the fault of the master, or if they are stolen, or lost so as to make the owner responsible, the master, generally, would be responsible also;[6] for the maritime law considers both the owner and master as carriers of the cargo.[7]

Although the master may, in a foreign port, make a charter-party which shall bind the owners, it is said that he cannot make either that or any other contract *under seal*, so as to bind them, without express authority.[8]

255; The Nelson, 1 Hagg. Adm. 169. See *contra*, Malpica *v.* McKown, 1 La. 248; Arayo *v.* Currel, 1 La. 528.

[1] Kelley *v.* Merrill, 14 Maine, 228.

[2] Garnhan *v.* Bennet, 2 Stra. 816; Thorn *v.* Hicks, 7 Cow. 697; Hussey *v.* Allen, 6 Mass. 163; James *v.* Bixby, 11 Mass. 34, 37; Nickerson *v.* Sch. Monsoon, 5 Law Reporter, 416; Wainwright *v.* Crawford, 3 Yeates, 131.

[3] See Phillips *v.* Tapper, 2 Barr, 323.

[4] Rich *v.* Coe, 2 Cowp. 636; Marquand *v.* Webb, 16 Johns. 89; James *v.* Bixby, 11 Mass. 34; Stocker *v.* Corlett, 1 Const. R. 81. In Sydnor *v.* Hurd, 8 Texas, 98, the master was held liable on the following instrument: "Due Sydnor & Bone, or order, by Sch. Cornelius and owners for supplies and materials received, the sum of two hundred and six dollars. William Hurd."

[5] Watkinson *v.* Laughton, 8 Johns. 213; The Sch. Leonidas, Olcott, Adm. 12, 15. But in an action of assumpsit for the breach of a contract of affreightment the owner and master should not be joined. Patton *v.* Magrath, Rice, 162.

[6] Morse *v.* Slue, 1 Vent. 190, 238; Barclay *v.* Cuculla y Gana, 3 Doug. 389; Watkinson *v.* Laughton, 8 Johns. 213.

[7] Elliott *v.* Rossell, 10 Johns. 1; Oakey *v.* Russell, 18 Mart. La. 58.

[8] See ante, p. 231, n. 3.

SECTION II.

OF THE MASTER'S POWER FROM NECESSITY.

As the master's power often arises from necessity, and is measured by it, it is important to ascertain what this necessity must be in each particular instance. For this necessity is very different, in different cases. Courts and text-writers use the same words in all these cases, saying in all alike that the master has the power, *from necessity;* but they must mean very different things. Thus, we have already seen what the necessity is which alone gives the master power to sell the ship without consulting the owner.[1] And it is also true that he may borrow money and hypothecate the ship for it by a bottomry bond, if this be necessary.[2] And he may also bind the owner to pay for the repairs which he makes, if those repairs were necessary.[3] But

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[1] See ante, p. 59–65.

[2] See post, § 4, p. 406.

[3] Stewart *v.* Hall, 2 Dow, 29; The Aurora, 1 Wheat. 96, per *Story*, J.; The Ship Fortitude, 3 Sumner, 228, 236; Burquin *v.* Flinn, 1 McCord, 316; Milward *v.* Hallett, 2 Caines, 77; Rocher *v.* Busher, 1 Stark. 27. See also, James *v.* Bixby, 11 Mass. 34. The question as to the degree of necessity necessary to confer the power on the master of binding the vessel and its owners for repairs and supplies furnished in a foreign port, was discussed at length in a recent case before the Supreme Court of the United States. Thomas *v.* Osborn, 19 How. 22, 31. Mr. Justice *Curtis*, in delivering the opinion of the court, said: "To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." It was therefore held in this case that, the master having received freight money, and having invested it with the assistance of the libellants in a series of adventures, the vessel was not liable for money advanced by the libellants to enable the master to repair and supply the vessel, and purchase a cargo to be transported and sold in the course of such private adventures, as the freight-money was sufficient to pay for the repairs and supplies, and might have been so used, if it had not been wrongfully employed by the master with the assistance of the libellants. Some of the remarks of

he has no power to draw upon the owners by a bill of exchange for supplies furnished in a foreign port, and render them liable as acceptors.[1]

To justify a sale, the necessity must be, as we have seen, of the most positive and stringent character. To make the owner responsible for repairs, however, it could not be necessary to show that the ship would have sunk or gone to ruin without them; for if they are, on the whole, reasonable and proper, that is enough.[2] Again, the necessity which authorizes a borrowing on bottomry, is not the same as either of these; it need not to be so stringent and extreme as the first; but it must be far greater than the second; it lies between them.[3] And we might go on and speak of other necessities and other powers springing from them, and endeavor to classify them. But it would accomplish no practical good; for after all, the only, and the reasonable rule must be, that the owner authorizes

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the learned judge above cited, apply only to the case which was then before the court, where the master was also the charterer, though the decision would unquestionably have been the same had he been merely the master.

[1] Bowen *v.* Stoddard, 10 Met. 375; May *v.* Kelly, 27 Ala. 497.

[2] Mr. Justice *Story* in the case of The Ship Fortitude, 3 Sumner, 228, 237, said: "In relation to what are necessary repairs in the sense of the law, for which the master may lawfully bind the owner of the ship, I have not been able, after a pretty thorough search into the authorities and text writers, ancient and modern, to find it anywhere laid down in direct or peremptory terms, that they are such repairs, and such repairs only, as are absolutely indispensable for the safety of the ship, or the voyage, or that there must be an extreme necessity, an invincible distress, or a positive urgent incapacity, to justify the master in making the repairs. The general formulary of expression found to be laid down is, simply, that the repairs are to be necessary, without in any manner pointing out what repairs are, in the sense of the law, deemed necessary, or what constitutes the true definition of necessity. But a thorough examination of the common text writers, ancient as well as modern, will, as I think, satisfactorily show, that they have all understood the language in a very mitigated sense; and that *necessary repairs* mean such as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety of the ship or the accomplishment of the voyage." See also, Webster *v.* Seekamp, 4 B. & Ald. 352; Rocher *v.* Busher, 1 Stark. 27; United Ins. Co. *v.* Scott, 1 Johns. 106; Milward *v.* Hallett, 2 Caines, 77; Pratt *v.* Reed, 19 How. 359.

[3] See post, § 4, C. In Pratt *v.* Reed, 19 How. 359, 361, it was said that the only difference between a case of necessity which would authorize an *implied* hypothecation of the vessel for supplies or repairs, and that necessity which would justify the giving of a bond, was, that in the latter case, the additional fact must appear, that the master could not procure the money, without giving the extraordinary interest incident to that species of security.

the master to do every thing within the general scope of a master's employment, which a rational man might believe that a rational owner would certainly do for himself if he were present at that time and place.[1]

So a master may, if necessary, appoint another in his place; although generally, an agent cannot delegate his power or duty without especial authority; and the master so appointed by a master, may bind the owner in like manner as the original master might have done.[2] So a master duly appointed by a charterer, binds not only his immediate principal, the charterer, but also the ship. But if appointed by the charterer, he would not, we think, bind the owner personally, without something from the owner, indicating, by word or act, that the master so appointed, was also clothed with authority by the owner.[3] A master appointed abroad by a consul, or any official person, agreeably to the usage of merchants in the given case, has the same power.[4] So the master of a steamboat,[5] or of a privateer,[6] has similar powers; always under the definition or description we have given above, of the necessity which creates or confers those powers.

Even if the contract be without the usual scope of the mas-

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[1] Webster *v.* Seekamp, 4 B. & Ald. 352. The question in this case was whether the owners of a vessel were liable for copper furnished by the order of the captain. The vessel was bound to the Mediterranean. It was proved that although it was extremely useful to copper vessels bound to that sea, yet it was not absolutely necessary, for many vessels went there without being coppered. The jury having found a verdict for the plaintiff, the court refused to set it aside. *Abbott*, C. J., said: "I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term 'necessary,' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable."

[2] 1 Bell, Comm. 413.

[3] See ante, p. 235. In Breed *v.* Ship Venus, U. S. D. C., Mass., 1805, it was held that charterers might lend money for the necessities of the ship to the captain of the ship appointed by themselves, and that a bond given to them by this master could be enforced against the ship.

[4] He may also give a bottomry bond. The Zodiac, 1 Hagg. Adm. 320; The Nuova Loanese, 22 Eng. L. & Eq. 623. In The Cynthia, 20 Eng. L. & Eq. 623, the consul appointed the master, and gave a bond himself. It was pronounced valid.

[5] The Steamboat New World *v.* King, 16 How. 469.

[6] We shall see, post, p. 393, n. 2, that the owners of a privateer are liable for the torts committed by the master, and it would follow that they are liable for his contracts

ter's employment, as the purchase of a cargo,[1] it may be adopted and confirmed by the owner; and such ratification may be express, or proved by acts which indicate such confirmation, or inferred from the voluntary acceptance and retaining of the cargo,[2] or from the fact that that owner had frequently and usually employed that master to act for him in that way.[3] But a master cannot, by any official or implied authority, annul or materially vary a contract expressly made by the owner himself; circumstances may change entirely, and it is perhaps possible that this change be such as to authorize the master to rescind or vary the owner's express contract; still, in point of fact, it may be said that nothing can raise a presumption of authority to do this;[4] nor can he bind the owner by a contract which is clearly neither necessary nor beneficial; as to carry goods in his ship free from freight and without any compensation whatever.[5]

It may, perhaps, be proper to remark, that the liability of the master and of the owner are both controlled by the rule, that any party who chooses to give credit to one only when he might have held others, cannot afterwards resort to those others. Thus, if one contracts for supplies to the ship, with the owner exclusively, he can never look to the master;[6] and if with the master exclusively, he can never look to the owner.[7] And this exclusive credit may be proved either by words and express agreement, or

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[1] Newhall *v.* Dunlap, 14 Maine, 180; Hewett *v.* Buck, 17 Maine, 147; Lyman *v.* Redman, 23 Maine, 289.

[2] Hewett *v.* Buck, and Lyman *v.* Redman, *supra*. In the latter case, the owners of the vessel sent the cargo which the master had bought to another port. While on the way part was thrown overboard to save the ship, and on arrival the residue was sold and the proceeds applied to the repair of the vessel. Held that this was a ratification of the purchase by the master. See also, Peters *v.* Ballistier, 3 Pick. 495; Hathorn *v.* Curtis, 8 Greenl. 356.

[3] Davis *v.* Marshall, 4 Harring. Del. 64.

[4] Burgon *v.* Sharpe, 2 Camp. 529.

[5] See Dewell *v.* Moxon, 1 Taunt. 391, and cases ante, p. 241, n. 2. But if a custom is proved to carry a certain class of passengers free, the master can bind the vessel by giving such a free passage. The Steamboat New World *v.* King, 16 How. 469. And he can bind himself to carry the goods of a seaman free, and it would seem that he could also, in such a case, bind the owners. Harrison *v.* Sch. Eclipse, Crabbe, 223.

[6] Farmer *v.* Davies, 1 T. R. 108; Farrel *v.* M'Clea, 1 Dall. 392.

[7] See cases ante, p. 384, n. 2.

by adequate circumstances. In the latter case, however, the circumstances must be such as would show conclusively that the creditor intended to charge the one, and not to charge the other; and it is doubtful whether a mere entry on his books charging either party would suffice to do this.[1] But it is customary for persons who deal in supplying vessels, to make the charge to the vessel itself, adding sometimes such words as "and all concerned in her."[2] This would be the same as to the ship "and owners."

An owner is responsible as such, who is actually an owner, although not registered as such, and his name does not appear on the papers of the ship.[3]

As the master may raise money for the ship, or expend his own, or procure supplies, or make other necessary and beneficial contracts, and is personally bound on those contracts, out of this grows his lien on the ship or the freight, for whatever is due to him. How far this lien extends, and indeed in what cases it exists, the authorities do not, perhaps, enable us to state very positively. In England it has been held that he can have no lien on the ship,[4] and therefore none on the freight, because this is a mere incident to the ship.

Some early cases moderated the severity of this rule somewhat, and gave him this lien for his disbursements;[5] but they are now overruled.[6] In this country, the law seems now to be, that the master has no lien on the ship for his wages,[7] or for his disburse-

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[1] See ante, p. 91, n. 3.

[2] See ante, p. 91, n. 3.

[3] See ante, p. 40, n. 2.

[4] Wilkins *v.* Carmichael, 1 Doug. 101; Hussey *v.* Christie, 9 East, 426; The Johannes Christoph, 33 Eng. L. & Eq. 600. But see Watkinson *v.* Bernadiston, 2 P. Wms. 367, note, where the Master of the Rolls decreed that sums disbursed by the captain on account of the ship in foreign ports, together with the wages of himself and crew, should be paid out of the proceeds of the ship, as they constituted a lien upon it.

[5] White *v.* Baring, 4 Esp. 22. So in equity, Hussey *v.* Christie, 13 Ves. 594; Ex parte Halkett, 3 Ves. & B. 135, 2 Rose, 194, 229, 19 Ves. 474; Pierson *v.* Robinson, 3 Swanst. 139, n.

[6] Smith *v.* Plummer, 1 B. & Ald. 575; Atkinson *v.* Cotesworth, 3 B. & C. 647, 5 Dowl. & R. 552; Gibson *v.* Ingo, 6 Hare, 112.

[7] The Ship Grand Turk, 1 Paine, C. C. 73; Revens *v.* Lewis, 2 Paine, C. C. 202; Fisher *v.* Willing, 8 S. & R. 118; Gardner *v.* The New Jersey, 1 Pet. Adm. 223; Phillips *v.* The Thomas Scattergood, Gilpin, 1; Steamboat Orleans *v.* Phœbus, 11 Pet. 175; Willard *v.* Dorr, 3 Mason, 91; Dudley *v.* The Steamboat Superior, U. S.

ments.[1] But for both of these he has a lien on the freight according to the best authorities.[2] But he has no lien for a general account.[3] If the cargo belongs to the owner of the ship, it has been held that the master has a lien on it for his disbursements.[4]

And if he has a lien on the freight, it would follow that he might detain the goods even against a shipper or consignee who had paid the freight to the owner of the ship, if the consignee had been duly notified by the master of his claim and lien, and ordered not to pay the owner.[5]

D. C., Ohio, 3 Am. Law Register, 622; Hopkins *v.* Forsyth, 14 Penn. State, 34; Richardson *v.* Whiting, 18 Pick. 530; Case *v.* Woolley, 6 Dana, 17, 22. But if a person is merely called a master, but is not one in fact, he can proceed against the ship *in rem* for his wages. L'Arina *v.* Brig Exchange, Bee, Adm. 198.

[1] In Gardner *v.* The New Jersey, 1 Pet. Adm. 223, 226, it was held that a master who paid claims which were liens on the vessel, was substituted in place of the lien creditors, and acquired a lien on the vessel. See also, Bulgin *v.* Sloop Rainbow, Bee, Adm. 116. Mr. Justice *Story* in the Ship Packet, 3 Mason, 255, 263, suggested that the master might have a lien on the ship where he used his own money to repair her in preference to borrowing on bottomry. But that he did not mean to express an opinion that generally a master has a lien on the ship for disbursements is evident, for in Steamboat Orleans *v.* Phœbus, 11 Pet. 175, he expressly states that this right does not exist. In a recent case before Mr. Justice *Curtis*, the whole question was learnedly examined, and it was held that no lien on the ship existed in such a case. The Larch, 2 Curtis, C. C. 427. See also, Hopkins *v.* Forsyth, 14 Penn. State, 34. By an early statute in Connecticut, the master in case of the neglect of the part-owner to furnish the outfits, could supply them and look to the vessel, but had no personal remedy against the owner. Brook *v.* Williams, 2 Root, 27.

[2] That he has a lien on the freight for his disbursements, see Lane *v.* Penniman, 4 Mass. 91; Lewis *v.* Hancock, 11 Mass. 72. In which case the court said: "He may be understood, as against the owner himself, to have the same right in the freight-money which a factor or consignee has in the goods of the principal or consignor, for whom money has been advanced, or any liabilities have been incurred, in consequence of the employment or consignment. The master of a vessel in a foreign port, and at home after a voyage performed, has many liabilities, from which he may have cause to protect himself, by insisting on his right to collect the freight-money." See also, Ingersoll *v.* Van Bokkelin, 7 Cow. 670, 5 Wend. 315; The Ship Packet, 3 Mason, 255; Drinkwater *v.* Brig Spartan, Ware, 149; Richardson *v.* Whiting, 18 Pick. 530. If by the shipping articles the master is directly responsible to the seamen for their wages, it would seem that he might retain the freight to indemnify himself. See Goodridge *v.* Lord, 10 Mass. 483. In regard to his lien on the freight for his wages, see Drinkwater *v.* Brig Spartan, Ware, 149; Richardson *v.* Whiting, 18 Pick. 530, 532. In Ingersoll *v.* Van Bokkelin, 7 Cow. 670, the Supreme Court held that he had a lien on the freight for his wages, but this decision was reversed by the Court of Errors, 5 Wend. 315.

[3] Shaw *v.* Gookin, 7 N. H. 16. See also, Hodgson *v.* Butts, 3 Cranch, 140.

[4] Newhall *v.* Dunlap, 14 Maine, 180.

[5] See ante, p. 256, n. 4.

SECTION III.

HOW FAR THE OWNER IS LIABLE FOR THE TORTS OF THE MASTER.

The owner is liable not only upon the contracts of the master of the kind above designated, but also for his wrong doings, and the injuries resulting from them, to a certain extent.[1] We consider that the principles of the law of agency, or of the relation of master and servant, suffice to measure this liability and to determine where it exists. Thus, the vessel and owners are liable for the delay of the master in presenting a proper manifest so that the owner of goods can pass his property through the custom-house, but they are not responsible for a tortious endeavor on the part of the master to prevent the owner from obtaining his goods.[2] If a vessel is chartered, and the master is the agent of the owners, it is his duty to collect the freight-money for the benefit of the charterers; and if he neglect to do so his owners are liable, unless the charterers directed some other person to collect it.[3] And if a master, by want of skill or care, brings his ship while navigating her into collision with another and inflicts injuries thereby, the owner is certainly liable.[4] But it has been held that the owners are not liable for a wilful col-

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[1] By the general rule of the maritime law, the owners of a vessel are liable for all injuries caused by the misconduct, negligence, or unskilfulness of the master, provided the act be done while acting within the scope of his authority as master. Beawes, Lex Mercatoria (4th London ed.), 54; Stinson *v.* Wyman, Daveis, 172; The Waldo, Daveis, 161; Dusar *v.* Murgatroyd, 1 Wash. C. C. 13, 17.

The owner of a vessel is liable for the tort of the master in shipping a minor without the consent of his father, if the master knew this fact at the time; the knowledge of the servant being considered equivalent to knowledge by the principal. See ante, p. 383, n. 1.

[2] The Zenobia, Abbott, Adm. 80, 93. So, in The Aberfoyle, Abbott, Adm. 242, 1 Blatchf. C. C. 360, it was held that a vessel was liable *in rem* for the wrongful act of the master in putting a passenger on short allowance, unless it was proved that the master's act was malicious and wrongful.

[3] Welch *v.* McClintock, S. J. C., Mass., Nov. T. 1857.

[4] The Thames, 5 Rob. Adm. 345; Stone *v.* Ketland, 1 Wash. C. C. 142; Martino *v.* Boggs, 1 La. Ann. 74. See also chapter on collision, ante, p. 187–211.

lision.[1] So if the master embezzles goods put on board, the owner is liable.[2] But he is not liable if the master embezzles or injures goods which he took on board to fill his own privilege, and received all the freight, commissions, and profits on them.[3] Nor is he responsible for goods clandestinely taken on board by the master, when the owner is himself on board, managing the lading of the vessel, or appointing an agent expressly therefor, and employing the master only in navigating the ship, and the shipper either did know this, or has sufficient notice to put him on his guard.[4] Nor is he responsible for money which the mas-

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[1] The Druid, 1 W. Rob. 391; Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill, 480, 2 Comst. 479. A contrary decision was however given in Ralston *v.* The State Rights, Crabbe, 22, 44, on the authority of the distinction pointed out by Mr. Justice *Washington* in the case of Dias *v.* Privateer Revenge, cited in a subsequent note. Mr. Justice *Hopkinson* said: "In the case now before this court, I do not understand it to be denied, that the owners of a vessel are answerable for the acts of their captain done within the course and scope of his employment and business. Is this not enough for this case? Assuredly it was within the course and scope of the employment and authority of Captain Allen to direct The State Rights to be steered at his pleasure; he had full power to do this, derived from his owners, and all on board were bound to obey his orders, without interposing their judgment as to the consequences to him or his owners. If by the execution of such an order a wrong is done to another party, on what principle of the common or maritime law can the owners of the offending vessel, the principals of such an agent, whom they have armed with the power to do the wrong, throw the responsibility from themselves? It is widely different from the case of the commission of a crime by the captain, which cannot be imputed to his owners, or be intended to come within the employment or authority committed to him." In Duggins *v.* Watson, 15 Ark. 118, a party who owned goods on board one vessel, brought an action against the owners of a colliding vessel, and the court ruled that he was entitled to recover, although the collision was wilfully caused by the master of the colliding boat. This case was decided on the authority of Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. 468, cited post, p. 394, n. 3; but it does not fall within the exception upon which that case rested, and was wrongly decided unless the principles contended for by *Hopkinson*, J., in the above case, be correct.

[2] Boucher *v.* Lawson, Cases temp. Hardw. 78, 183.

[3] King *v.* Lenox, 19 Johns. 235; Boucher *v.* Lawson, Cases temp. Hardw. London ed. 85, 194; Dublin ed. 78, 183. But in Phile *v.* The Anna, 1 Dall. 197, an owner of a vessel was held liable for the tort of the master in smuggling goods, which were part of the master's privilege, and did not belong to the general cargo of the ship.

[4] Walter *v.* Brewer, 11 Mass. 99; Reynolds *v.* Toppan, 15 Mass. 370; Ward *v.* Green, 6 Cow. 173. In Walter *v.* Brewer, the owner was with his vessel at Monte Video, for the purpose of taking a cargo for himself, and not intending to take freight for others. The master, without the knowledge of the owner, took on board a few bales of Neutra skins, to carry to Boston. It was in evidence that the bales would not more than fill the "privilege," which the masters of vessels, in a case like that, were

ter borrows for his own private purposes, unless the lender believed on sufficient reason that it was borrowed for the ship.[1] The owners of a privateer are responsible for the torts of the officers and crew committed in the exercise of their employment,[2] but they are not liable for piratical acts committed by such officers and crew.[3] All of these cases, and very many more of

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accustomed to have. The judge, at *Nisi Prius*, instructed the jury, "That, although the owners of ships were generally liable for the contracts of their masters abroad touching the ship on the voyage; yet, as the owner, in this instance, had himself gone in the ship, for the purpose of procuring a cargo, and as the ship was not put up for freight, and as the defendant was not consulted respecting this shipment, nor the persons who attended to his business in his absence, but they were taken on board without his knowledge, he was not accountable originally for the safe transportation and delivery of the goods; but that, if the jury believed that the defendant knew, before his ship sailed from Monte Video, that these bales had been taken on board by the master, he must be considered as having adopted the act of the master, and as having consented thereto, and so would be accountable." These instructions were held to be correct, with the exception that it was not sufficient to charge the owner that he knew that the goods were taken on board, but that he must have "knowledge that the goods were received on board upon freight." In Nichols *v.* DeWolf, 1 R. I. 277, it was held that where an owner sent a vessel on his own account, the master as such had no authority to sign bills of lading." But in Murfree *v.* Redding, 1 Hayw. 276, the owner denied his liability for the breach of a contract of affreightment entered into by the master, on the ground that the latter was put on board merely to navigate the vessel. But the court were of opinion that as he was held out as master, the contract being within the scope of his authority, the owner was liable.

[1] See post, p. 413, n. 7.

[2] The San Juan Baptista, 5 Rob. Adm. 33; The Karasan, id. 291; Die Fire Damer, id. 357; Nostra Signora de los Dolores, 1 Dods. 290; L'Invincible, 1 Wheat. 238; The Anna Maria, 2 Wheat. 327; The Amiable Nancy, 1 Paine, C. C. 111, 3 Wheat. 546; Talbot *v.* The Commanders of Three Brigs, 1 Dall. 95; Del Col *v.* Arnold, 3 Dall. 333; Arnold *v.* Del Col, Bee, Adm. 5; Gibbs *v.* The Two Friends, Bee, Adm. 416. In The Amiable Nancy, *supra*, a doubt was expressed whether the liability extended to personal trespasses committed by the master and crew against persons on board the prize. Some of the cases above cited would seem, however, to extend the liability of the owners to a greater extent than more modern cases would justify.

[3] Dias *v.* The Privateer Revenge, 3 Wash. C. C. 262, 268. This case might seem to countenance a distinction which has been sometimes taken between mere torts and offences for which the master is criminally responsible. See Ralston *v.* The State Rights, Crabbe, 22.

But the writers on maritime law do not appear to make any distinction in this respect between acts which are criminally punishable, and such as are not, nor is it apparent how they could do so, save in the case of offences against the law of nations; and Dr. Lushington, in the case of The Druid, 1 W. Rob. 391, intimated that he believed none to exist. In Manro *v.* Almeida, 10 Wheat. 473, it was argued that, as the trespass complained of was alleged to have been piratically done, the civil remedy merged in the crime. The court said: "But this we think, clearly, cannot

a like kind, resolve themselves into this rule; that the owner is responsible for the direct consequences of any wrong doing of the master, which is done by him as master, in the discharge of his duty, and under the authority given him as master.[1] And here, as in most cases under the law of shipping, the established usage of the port, or of the trade in which the vessel is employed, is of great importance. The question how far the owners of a vessel are liable for the wilful and malicious act of the master, is one of great difficulty, especially when such act is done by the master while employed in the usual course of his business. It is said in one case that the liability of the owners depends on the general principles of the maritime law, and not on any special contract.[2] But their liability may undoubtedly be increased by a special contract, and the distinction has been taken in some recent cases between the act of the master towards one to whom the owner owes no more duty than one citizen owes to another, and his act when this duty is increased by reason of a special contract or an obligation imposed upon him by virtue of his office as carrier. In such a case it would seem that the owner is liable even for the wilful tort of his servant, if it was committed while in his employ and in the management of the conveyance under his control, although the wrong was done in direct opposition to the express commands of the owner.[3] And if the owners are obliged to pay dam-

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be maintained. Whatever may have been the barbarous doctrines of antiquity about converting goods piratically taken into droits of the admiralty, the day has long gone by since it gave way to a more rational rule, and the party dispossessed was sustained in his remedy to reclaim the property as not devested by piratical capture."

[1] Dias *v.* The Privateer Revenge, 3 Wash. C. C. 262, 268. The decision of the learned judge in this case goes very thoroughly over the whole question, and draws the distinction between a wilful act done while the servant is engaged in the prosecution of his master's business, — as when the master of a vessel commits spoliation on property rightfully seized as a prize, in which case the owners of the vessel would be liable, — and an act wholly out of the scope of his employment, as a piratical seizure. The distinction here pointed out was acted upon in the case of Ralston *v.* The State Rights, Crabbe, 22, which case we have referred to more at length, ante, p. 392, n. 1, but what we consider to be the true doctrine of the common law is stated by Mr. Justice *Cowen*, in Wright *v.* Wilcox, 19 Wend. 343, 345, to be that the law holds every wilful act to be a departure from the master's business.

[2] Dean *v.* Angus, Bee, 369, 375.

[3] This was so held in Weed *v.* Panama Railroad Co., 5 Duer, 193, where a conductor on a railroad stopped and detained the train in a swamp during the night, and

ages for the wrong doing of the master, they have their remedy over against him.[1]

By the general maritime law the responsibility of the owners of a vessel for the acts of the master and mariners, was limited to the value of the ship and freight; and, by abandoning them, or by their loss before the termination of the voyage, all liability ceased.[2] The Marine Ordinance of France of 1681,[3] provided that the owners of ships should be responsible for the acts of the master, but that they should be discharged upon abandonment

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the company was held liable for the injuries sustained by a passenger in consequence thereof. In a late case in the Supreme Court of the United States, Philadelphia & Reading Railroad Co. *v.* Derby, 14 How. 468, the defendant in error was riding in a train, on the railroad of the plaintiffs, which came into collision with another train belonging to the same company, whereby he was injured. The accident was caused solely by the engineer of the colliding train running his engine on a track over which he had received express orders not to go. It was held that the company was liable. The court said: "We find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondeat superior*, would, in a measure, nullify it." In Keene *v.* Lizardi, 5 La. 431, the owners of a vessel were held liable for the misbehavior of the master to passengers. See also, St. Amand *v.* Lizardi, 4 La. 243; Block *v.* Bannerman, 10 La. Ann. 1. In Chamberlain *v.* Chandler, 3 Mason, 242, which was an action against a master of a vessel for ill treatment towards his passengers on the voyage, Mr. Justice *Story* set forth at length the rights of passengers, and held that "their contract is not for mere ship room, and personal existence on board; but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor, which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress."

In Malpica *v.* McKown, 1 La. 248, it was held that the owner was liable for money of a deceased passenger converted by the captain to his own use. And in Arayo *v.* Currel, 1 La. 528, where the master, the ship having run aground, told the passengers to go on shore, in order that the ship might be lightened, and after the ship was got off, he sailed away without them, it was held that the owner was liable. See Sunday *v.* Gordon, Blatchf. & H. Adm. 569.

[1] Dean *v.* Angus, Bee, Adm. 369; Purviance *v.* Angus, 1 Dall. 180.

[2] Emerigon, Contrats à la Grosse, ch. 4, § 11; The Rebecca, Ware, 188, 198; The Phebe, Ware, 263, 271. By the civil law each of the owners was bound *in solido* for the full amount of the obligations of the master, arising *ex contractu*. Dig. 14, 1, 1, 25; Dig. 14, 1, 2. But for obligations *ex delicto*, each was bound only for his part, that is, in proportion to the interest he had in the ship. Dig. 4, 9, 7, 5; The Rebecca, Ware, 188, 194; The Phebe, Ware, 263, 268. The contrary is stated in Stinson *v.* Wyman, Daveis, 172, 175, but apparently without reflection.

[3] Ord. de la Mar. liv. 2, tit. 8, art. 2.

of their ship and freight. There has been quite a discussion whether this provision applied to contracts made by the master within the legitimate scope of his authority as master, as where he borrowed money for the necessary repairs and supplies of the ship.[1]

In England the liability of the owners of vessels has been limited by various statutes to the value of the ship and freight.[2] The language of the statute now in force is as follows, that "the owners shall not be answerable in certain specified cases, beyond the value of the ship and the freight due or to grow due, in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution, or contracted for." This statute is substantially the same as the prior ones, and gives no right of abandonment. Several questions of great interest have been decided under the preceding statutes, which we refer to as aids in the true construction of our statutes.

The question first discussed was in respect to the time at which the value of the ship and freight were to be taken, in a case where the master improperly sold the cargo and terminated the voyage, and the court held that the value at the time of the loss, and not that at the commencement of the voyage, was to be taken.[3] All the subsequent cases in England, where the time at which the value should be taken has been discussed, have been cases of collision, and it has been held that the value existing immediately prior to the occurrence of the accident, is

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[1] Valin, book 2, tit. 8, art. 2, and Pothier, "Des Proprietaires," liv. 2, tit. 8, art. 2, hold, on the one hand, that the provisions of the article above referred to, do not apply to the contracts of the master, while Emerigon, Traite à la Grosse, ch. 4, § 11, is of the opposite opinion. The New Code de Commerce adopts substantially the language of the Ordonnance, and this has occasioned another controversy. Pardessus, Cours de Droit Comm. tom. 3, tit. 3, c. 3, art. 663, supports the views of Valin, while Boulay Paty, Droit Comm. tom. 1, tit. 3, adopts those of Emerigon. The Court of Cassation has, however, decided that the owner of a vessel is indefinitely responsible for all the acts of the captain within the sphere of his authority, and especially for bottomry loans contracted in the course of a voyage. Tourrel *v.* Fabry, 19 Am. Jurist, 233.

[2] Stats. 7 Geo. 2, c. 15; 26 Geo. 3, c. 86; 53 Geo. 3, c. 159; 17 & 18 Vict. c. 104, § 503, et seq.

[3] Wilson *v.* Dickson, 2 B. & Ald. 2. This decision was affirmed in a subsequent case, under similar circumstances. Cannan *v.* Meaburn, 1 Bing. 465.

that on which the liability of the owners is to be based, even though the vessel in fault sunk immediately after the collision.[1] The value of the vessel at that time is the sum for which she could have been sold, and this is to be ascertained, not by making deductions from her cost price proportioned to her age, but by a valuation and appraisement.[2] In respect to the freight, that paid in advance has been included.[3] And it has been held that the whole freight is liable, and that no deductions are to be made for, or on account of bottomry, mortgage, pilotage, or towage, or for seamen's wages.[4] The amount of freight for which the owners are liable, is that which would have been earned had the voyage been completed, and not that calculated on at the commencement of the voyage.[5]

If a part-owner is on board and in command of the vessel,

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[1] Brown *v.* Wilkinson, 15 M. & W. 391; The Mary Caroline, 3 W. Rob. 101; Leycester *v.* Logan, 3 Kay & J. 446.

[2] Wilson *v.* Dickson, 2 B. & Ald. 2; Dobree *v.* Schroder, 6 Sim. 291, 2 Mylne & C. 489. In The African Steamship Co. *v.* Swanzy, 2 Kay & J. 660, it was held, that the *value* of a ship within the meaning of the Merchant Shipping Act of 1854, 17 & 18 Vict. c. 104, s. 504, was not the value which the owner would have set upon his vessel, nor was the sum, for which he might have recently insured her, the only criterion, although it might be one of many. But under ordinary circumstances, and with the exception of the case where there is no market for a ship of the kind, such value would be taken to be what the ship would have brought, if sold immediately before the loss. In the excepted case one criterion would be to ascertain what the ship cost, and then to deduct the subsequent deterioration. See also, generally, The Dundee, 1 Hagg. Adm. 109, S. C., Gale *v.* Laurie, 5 B. & C. 156; The Carl Johan, cited 1 Hagg. Adm. 113.

[3] Wilson *v.* Dickson, 2 B. & Ald. 2.

[4] The Benares, 1 Eng. L. & Eq. 637.

[5] Cannan *v.* Meaburn, 1 Bing. 465. In this case the vessel sailed with a full cargo, the freight of which would have amounted to £2,000 if the goods had arrived at their port of destination. On the voyage the vessel put into port in distress, and the captain sold a part of the cargo which belonged to the owners of the vessel for the purpose of raising funds for repairs. Part was applied to this object, and the remainder of the proceeds was remitted to the owners of the vessel. The vessel then proceeded on her voyage, but became leaky, and a jettison of another portion of the cargo was made. She then put into an intermediate port, and the cargo was unloaded and stored in two warehouses. Soon after one warehouse with its contents was consumed by fire, leaving one hundred and forty chests of indigo, and thirty casks of tallow, which were in another warehouse, remaining. The ship and the remaining cargo were afterwards sold without the knowledge or privity of the defendants. The jury found that the ship might have been repaired and the goods forwarded. The court held that only the freight of the goods which remained, and which might have been sent on, was liable.

his negligence does not deprive the other owners of the benefit of the statute.[1] Nor can the negligent part-owner be made answerable beyond the value of the ship and freight, if the action is *in rem*, and he is a party to the suit, merely by reason of his entering his appearance as owner.[2] The owners of a vessel are, however, personally liable for costs, if the ship and freight are not sufficient to compensate for the damage done.[3]

The statute of 26 Geo. 3, c. 86, was designed to apply only to vessels usually employed in making sea voyages, and not to small craft, lighters, or boats engaged in inland navigation.[4]

Where a liability is incurred by any owner of a vessel in a case where he is responsible only to the value of the ship and freight, and several claims are made or apprehended in respect to such liability, it is obvious that great injustice would be done were the owner liable to each party interested, to the full value of the ship and freight, and this would be true, on the other hand, in respect to the others having claims against the owner, were it held that the latter was only liable to the first who should obtain judgment against him. To obviate this difficulty it has been provided that the owner may institute proceedings in the High Court of Chancery in England or Ireland, and in Scotland in the Court of Sessions, and in any British possession in any competent court, to determine the amount of his liability, and to distribute such amount ratably among the several claimants, with power to the court to stop all actions and suits pending in any other court in relation to the same subject-matter.[5] But as a general rule the court in which the case is pending will not restrain the plaintiff from proceeding because the defendant

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[1] Wilson *v.* Dickson, 2 B. & Ald. 2.

[2] The Volant, 1 W. Rob. 385.

[3] The Volant, 1 W. Rob. 385; Dobree *v.* Schroder, 6 Sim. 291; The John Dunn, 1 W. Rob. 159. A prohibition was afterwards moved for in this case in the Court of Queen's Bench, but the rule was discharged, the court being of the opinion that the true principle had been adopted in the admiralty court. Ex parte Rayne, 1 Q. B. 982, 1 Gale & D. 374.

[4] Hunter *v.* M'Gown, 1 Bligh, 573. It was held in this case that the owners of a gabbert, a species of lighter, were liable for the loss of goods on board by an accidental fire.

[5] Act of 17 & 18 Vict. c. 104, § 514.

has filed his bill in equity for relief.[1] And in order to stay proceedings the owner must aver that he had incurred liability in respect of some damage.[2] If a party obtains judgment in another court before the owner institutes proceedings in chancery, he is allowed his costs, but is entitled to no other preference over the other claimants, and must share ratably with them in the value of the ship and freight.[3]

Since the liability of the owners of a vessel is limited by statute, the fact that, if the vessel is arrested, they give bail to a larger amount, does not increase their liability.[4]

We shall now proceed to examine, somewhat at length, the provisions of the statutes which have been passed in this country, restricting the liability of ship-owners. Local statutes were first passed in Massachusetts[5] and Maine,[6] and it was not till the year 1851 that any general statute was enacted by congress.[7] The statutes of Massachusetts and Maine provide that "no ship-owner shall be answerable, beyond the amount of his interest in the ship and freight, for any embezzlement, loss, or destruction, by the master or mariners, of any goods, wares, or merchandise, or any property put on board of such ship or vessel, nor for any act, matter or thing, damage or forfeiture done, occasioned or incurred, by the said master or mariners, without the privity or knowledge of such owner." Neither of these statutes, it will be seen, gives the right of abandonment, but in a case in Maine, the statute seems to have been construed as if such a clause existed;[8] but the language of Mr. Justice *Story*, in a

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[1] Thiseldon *v.* Gibbons, 8 Dowl. P. C. 419, *nom.* Thistleton *v.* Gibbons, 4 Jur. 629.

[2] Hill *v.* Andrus, 1 Kay & J. 263.

[3] Leycester *v.* Logan, 3 Kay & J. 446.

[4] The Richmond, 3 Hagg. Adm. 431; The Mary Caroline, 3 W. Rob. 101, 105; The Duchesse de Brabant, Eng. Adm., 21 Law Reporter, 243.

[5] Rev. Stats. Mass. c. 32, § 1.

[6] Rev. Stats. Maine, 1841, c. 47, § 8; Rev. Stats. 1857, c. 36, § 5.

[7] Act of 1851, c. 43, 9 U. S. Stats. at Large, 635.

[8] Stinson *v.* Wyman, Davcis, 172. The action in this case was on a bill of lading to recover for damage done to goods by their being improperly carried on deck. It was held, that the statute was intended to limit the responsibility of the owner for losses occasioned by the fault or negligence of the master, as well as for those which arise from direct and wilful fraud; and that if the decree should exhaust the whole value of the ship and freight, the respondents, by abandoning, would be released from further responsibility.

subsequent case under the Massachusetts statute, tends to show that the value of the ship and freight in cases of tort, as well as in cases of contract, is to be taken at the time when the right of action accrues to the injured party.[1]

The United States statute, passed in 1851,[2] differs in some respects from the statutes previously referred to. The third section provides, "That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or per-

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[1] Pope *v.* Nickerson, 3 Story, 465. The action in this case was *in personam* against the owners of the vessel to recover a cargo of fruit and wine consigned to the plaintiffs. The vessel sailed in a sea-worthy condition, but was obliged, on the voyage, to put into an intermediate port in distress. Part of the cargo, which was in a damaged condition, was sold and the proceeds applied to defraying the expenses of repairing the vessel. This amount not being sufficient the master obtained the rest on a bottomry bond intended to cover the vessel, cargo, and freight. The vessel then sailed, but was obliged to put back, and the rest of the cargo, part of which was in a perishing condition and part not, was sold together with the ship. The proceeds of vessel and cargo were applied to the payment of the bond, and the surplus paid over to the master. There were three questions presented under the statute of Massachusetts. First, whether the statute applied to cases of contracts made by the master within the scope of his authority. Second, admitting the statute applied, at what time the value of the ship and freight was to be taken; and, third, as to the time of the valuation in case of tort. On the first point Mr. Justice *Story* was of the opinion, in accordance with the authorities cited ante, p. 396, note 1, that the statute was not applicable. He then was of the opinion that if the statute did apply to the case where the master appropriated the proceeds arising from the sale of a perishable cargo, to the repairing of the ship, the value of the ship and freight was to be taken as it existed at the time of such appropriation, and not subsequently, when it was burdened with a bottomry bond. He said, p. 498: "But at what time is this value to be ascertained and fixed? It must be the value at the time when the right of action against the owners first accrues, and not at any subsequent period. Suppose, after the right of action has attached, the ship perishes, that will not affect the right of recovery of the shipper in a case of tort; and *a fortiori* it will not in a case of contract made by the master, by and under the authority of the owners." In regard to the third question, as to the liability of the owners for the goods finally sold, Mr. Justice *Story* said, p. 504: "They are liable therefor to the extent of their interest in the schooner and freight, and no further, at the time of the misconduct and tortious sale. But at that very time the ship was under a bottomry bond greater than her value, and by the breaking up of the voyage, and the sale of the schooner, the bond became absolutely due to the bond holders. These were acts of the master contemporary with the voluntary sale of the cargo, and indeed they may all be treated as one and the same transaction, constituting parts of the *res gestæ*, and done, as it were, *uno flatu et uno intuitu*. So that, at the time, the owners had, in effect, no interest whatsoever in the schooner or freight, but the value of both had been exhausted."

[2] Ch. 43, 9 U. S. Stats. at Large, 635.

sons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending."

The fourth section provides, "That if any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship and vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto.[1] And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claim and proceedings against the owner or owners shall cease."

Several questions of great difficulty and importance have arisen in respect to the construction of these two sections. First, Is the value of the ship and freight to be estimated immediately prior to the occurrence of the event which imposed the liability on the ship-owner, or is that existing at the time of suit brought to be taken? Second, Does the same rule apply to cases of a breach of a contract of affreightment and those of collision, under the third section? Third, How far does the right of

[1] The 2d section of the Massachusetts statute and the 9th section of the Maine statute are very similar to this. Rev. Stats. Mass. c. 32; Rev. Stats. Maine, c. 47. This is substantially reënacted by Rev. Stats. Maine, 1857, c. 36, § 5.

abandonment given by the fourth section correspond with the provisions of the maritime law, and what effect does it have upon the third section as determining the time when the value of the ship and freight is to be taken? Fourth, Is an abandonment allowed in a case of collision under the fourth section?

It is a primary rule in the interpretation of a statute, that all the sections thereof are to be construed together, so that one section may often be explanatory of another.[1] We shall, therefore, first consider the effect of the fourth section relative to the right of abandonment.

The first part of this section, we think, clearly does not apply to a case of collision. It is limited in express terms to the case of loss suffered by freighters or owners of goods or any property whatever on the same voyage; and is intended to allow the proceedings therein set forth only in a case of a breach of a contract of affreightment, where several claims are pending against, or apprehended by, the owners of the ship. The omission of the subject of collision seems to have arisen by the framers of the statute following the statutes of Massachusetts and Maine, which, like the early English statutes of 7 Geo. 2, c. 15, and 26 Geo. 3, c. 86, limited the owner's liability to cases of affreightment and did not apply to collision. We infer this because the language of the 53 Geo. 3, c. 159, which applies to collision, is so clear and explicit on this point that it must have been followed, had it not been overlooked, or intentionally passed over. This statute provides that "if several persons shall suffer any loss or damage in or to their goods, wares, merchandises, ships, or otherwise," etc.

The question then is, whether the last part of the fourth section, which commences, "And it shall be deemed a sufficient compliance with the requirements of this act," applies solely to the former part of the same section, or to the third section. If the former construction be the true one, the right of abandonment is but an extension of the right given by the English and American statutes alike of applying to the court where there are several claims pending or apprehended. So that the ship-

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[1] See The Dundee, 1 Hagg. Adm. 109, 121; Wattson *v.* Marks, U. S. D. C., Penn., 2 Am. Law Register, 157.

owner has the right of ceasing to be a party to the suit by transferring his interest (which must then be construed to mean the amount of his liability) to a trustee.

It is an undoubted principle, that statutes which are in derogation of the common law are to be construed strictly, and this, and similar statutes, limiting the liability of ship-owners, are clearly subject to this rule.[1] Now by the common law the owner was liable to the full extent of the damage done. But the right of action did not accrue in all cases at the same time. In a case of tort, the right of action existed the moment the tort took place, while in an action for a breach of contract, no right existed till the time when the contract was broken, or when it became evident that it could not be performed. It would, therefore, follow that if the right of abandonment does not apply to any thing more than the first part of the fourth section, the value of the ship and freight in a case of collision should be taken at the time when the right of action accrued, and this, according to the English decisions, is the value immediately prior to the accident. In cases of contracts of affreightment the right of action may accrue at different times according to circumstances. Thus, if on a voyage the goods are embezzled, it may well be that the right does not accrue till the end of the voyage because the master may obtain possession of the goods and deliver them, in accordance with the terms of the bill of lading. But where the goods are wrongfully sold by the master and the voyage broken up, we think it equally clear that the right of action accrues at once and that the value of the ship and freight should be estimated at that time.[2]

It only remains, then, to consider to what the last part of the fourth section was intended to apply. The term "for such claimants" would seem clearly to refer to the claimants mentioned in the former part of the section, and not to extend to the third section, in which the word does not occur. It may be said

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[1] Pope *v.* Nickerson, 3 Story, 465; The Rebecca, Ware, 188; The Phebe, Ware, 263, 271; Stinson *v.* Wyman, Daveis, 172, 175; The Karasan, 5 Rob. Adm. 291; The Benares, 1 Eng. L. & Eq. 637; Low *v.* Mumford, 14 Johns. 426; Patten *v.* Gurney, 17 Mass. 182.

[2] See Pope *v.* Nickerson, 3 Story, 465; Wilson *v.* Dickson, 2 B. & Ald. 2; Cannan *v.* Meaburn, 1 Bing. 465.

that since the trustee is authorized to hold for the benefit of "the person or persons who may prove to be entitled thereto," it follows that the act had reference to a case where there was but one claimant, and this could only be under the third section. But the answer is, that although there be several claimants, yet only one may be entitled to recover, and the word "person" is meant to apply to him.

Our confidence in this position is somewhat shaken by a learned and elaborate decision in the District Court of the Pennsylvania District,[1] but we think further adjudication is necessary to determine the various points which have arisen under this statute. It was also held, in this case, that the fact of the vessel's being insured and a loss paid, would confer no rights upon the shipper, this not being an "interest in the vessel" within the meaning of that term, in the Act of 1851.

In respect to the "freight then pending," it has been held that the earnings of the vessel in transporting the goods of the owners are to be included.[2]

The second section of the Act of 1851,[3] provides "that if any shipper or shippers of platina, gold, gold dust, silver, bullion, or

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[1] Wattson *v.* Marks, U. S. D. C., Penn., 2 Am. Law Register, 157. The point actually decided in this case does not conflict, we think, with any of the English cases. And the opinion of the court, though very learned and elaborate, does not seem to be in every respect accurate, especially in stating the points decided in cases cited in the course of the decision. The libel was *in personam* upon a contract of affreightment. The vessel was wrecked on the coast of California, and at some time, either shortly before or after she struck, the goods of the libellant were stolen by some person unknown. *Kane*, J., said, p. 163: "But whether the robbery preceded or followed the moment of wreck, or was contemporaneous with it, is in my judgment of no importance." This opinion proceeds on two grounds, first, that aside from the fourth section of the statute the value of the ship and freight is to be taken at the time the right of action accrued to the shipper, and that "the right of action, in a contract of affreightment against the carrier, unlike that which grows out of a collision, does not accrue till the end of the voyage, or the lapse of a reasonable time for the delivery of the cargo." And, second, because under the fourth section the measure of the ship-owner's liability must be, "in cases of affreightment at least, the value of the vessel and freight at the time of suit brought." The reason given for this is, that the transfer of his interest could not pass more than he had at the time. But the words "interest in such vessel and freight" may mean something more than merely his share in the vessel, and may be construed as the amount due by reason of such ownership, or in other words, his interest in the ship and freight at the time the right of action accrued.

[2] Allen *v.* Mackay, U. S. D. C., Mass., 16 Law Reporter, 686.

[3] Ch. 43, 9 U. S. Stats. at Large, 635.

other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner, or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered."

Under this statute it has been held, that where the contract of carriage has been clearly defined in all its particulars by the parties in the bill of lading, and there is no imputation of fraud or mistake against the shipper, but he has fully executed his part of the contract, the ship-owner shall not relieve himself from liability by alleging that there has been a want of literal conformity to the provisions of this section; and that the carrier is estopped from denying his liability, if the bill of lading contains a substantial and clear recognition of all the facts which the statute required the shipper to inform the master of.[1]

The English statute of 17 & 18 Vict. c. 104, § 503, exempts the owners of a vessel from loss occasioned by reason of robbery, embezzlement, making away with or secreting similar articles, "unless the owner, or shipper thereof, has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles." Under this statute it has been held, that the description in the bill of lading of a parcel of gold shipped as "one box containing about two hundred and forty-eight ounces of gold dust," is not a sufficient statement of its value.[2]

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[1] Wattson *v.* Marks, U. S. D. C., Penn., 2 Am. Law Register, 157. The case of Greyor *v.* The Black Warrior, U. S. D. C., La., Boston Courier, March 18, 1858, seems to be opposed to so liberal a construction, but the report of the case does not state whether or not the bill of lading contained a statement of the facts required by the statute to be in the note.

[2] Williams *v.* African Steamship Co., 1 H. & N. 300, 37 Eng. L. & Eq. 462. In Gibbs *v.* Potter, 10 M. & W. 70, on a shipment of a cargo from Valparaiso to Eng-

We have already seen that both in England and in this country the owner of a vessel is not liable for damage done to goods by an accidental fire happening to, or on board, of a vessel.[1] The act of 1851 does not apply to any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in river or inland navigation.[2] Under this section it has been held, that a vessel on Lake Erie is not a vessel used in inland navigation, the lakes not being considered as inland waters.[3]

SECTION IV.

OF THE CONTRACTS OF BOTTOMRY AND OF RESPONDENTIA.

A. *Of the purpose of a Bottomry Bond.*

One of the most important of the powers of the master is that of making a bottomry bond. By this instrument the ship is hypothecated for the payment of money borrowed.[4] As usually defined, its essentials are, that it shall bind the ship for the payment of the money, provided the ship perform a certain voyage and arrive in safety; and if the ship be lost, no part of

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land, the bills of lading described the property as "1,338 hard dollars," which was a coin current at Valparaiso at the time. It was held to be a sufficient compliance with the provisions of the statute of 26 Geo. 3, c. 86, s. 3, which is similar to that above, on the ground that it is enough to state the value at the port of shipment. Lord *Abinger* also doubted whether the act could apply to countries not subject to British rule, and was clearly of the opinion that if it did, it could only be when the goods were shipped to an English port.

[1] See ante, p. 183, note.

[2] § 7, 9 U. S. Stats. at Large, 636.

[3] Moore *v.* American Transp. Co., Supreme Ct., Mich., Boston Courier, Aug. 3, 1858.

[4] The contract of bottomry is so called because the keel or bottom of the ship is pledged, a part being figuratively used for the whole. The Atlas, 2 Hagg. Adm. 48, 53; Scarborough *v.* Lyrus, Latch, 252, Noy, 95. In Blaine *v.* The Charles Carter, 4 Cranch, 328, *Chase*, J., said: "A bottomry bond made by the master, vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her, which may be enforced, with all the expedition and efficiency of the admiralty process." See also, Johnson *v.* Shippen, 2 Ld. Raym. 982; Johnson *v.* Greaves, 2 Taunt. 344; United States *v.* Delaware Ins. Co., 4 Wash. C. C. 418.

the sum borrowed is to be repaid;[1] and because the lender takes upon himself this risk, he may charge for the use of the money, maritime interest, or extra interest which will cover and compensate for the risk he runs, which interest would be usurious but for that risk.[2] Such is the description in fact of nearly all bottomry bonds; but there seems no good reason why a bottomry bond may not provide for common interest, and for payment by the owner of the ship of the money borrowed whether the ship be safe or lost; and, nevertheless, be so far a bottomry bond as to bind the ship effectually and give a lien upon it which may be enforced as in the case of an ordinary bottomry.

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[1] The Atlas, 2 Hagg. Adm. 48; Jennings *v.* Ins. Co. of Penn., 4 Binn. 244; Greeley *v.* Waterhouse, 19 Maine, 9; Leland *v.* The Ship Medora, 2 Woodb. & M. 92, 107; Rucher *v.* Conyngham, 2 Pet. Adm. 295, 303; The Brig Draco, 2 Sumner, 157; Bray *v.* Bates, 9 Met. 237; The William and Emmeline, Blatchf. & H. Adm. 66; The Brig Atlantic, 1 Newb. Adm. 514; The Emancipation, 1 W. Rob. 124; Stainbank *v.* Fenning, 11 C. B. 51, 6 Eng. L. & Eq. 412. In The Nelson, 1 Hagg. Adm. 169, the sum was to be paid within one month "after the ship arrived at her port." This was held to be a sufficient description of a sea risk. In Simonds *v.* Hodgson, 3 B. & Ad. 50, the bond, after reciting that the vessel had received damage, and that the master had borrowed £1,077, proceeded as follows: "I bind myself, my ship, her apparel, tackle, etc., as well as her freight and cargo, to pay the above sum with £12 per cent. bottomry premium; and I further bind myself, said ship, her freight and cargo, to the payment of that sum, with all charges thereon, *in eight days after my arrival* at the port of London; and I do hereby make liable the said vessel, her freight and cargo, *whether she do or do not arrive at the port of London*, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges, until such principal sum, with £12 per cent. bottomry premium, and all charges are duly paid." Held, reversing the judgment of the Court of Common Pleas, 6 Bing. 114, that this was an instrument of bottomry, that the words *my arrival* must be understood to mean *my ship's arrival*, and that the words, "I make liable the said vessel, etc., whether she do, or do not arrive at London," were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of the loss of the ship.

[2] Sharpley *v.* Hurrel, Cro. Jac. 208; Soome *v.* Gleen, Sid. 27; The Cognac, 2 Hagg. Adm. 377, 387. In The Atlas, 2 Hagg. Adm. 48, 57, Lord *Stowell* said: "If the ship arrived safe, the title to repayment became vested; but if the ship perished *in itinere*, the loss fell entirely upon the lender. Upon that account, the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and, therefore, was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was, therefore, entitled to charge his *pretium periculi*, his valuation of the danger to which he was exposed." In White *v.* Ship Daedalus, 1 Stuart, Lower Canada, 130, a bond on a voyage from Quebec to London at twenty-five per cent. interest, was held to be valid.

It must be remembered that the law-merchant not only permits such a bargain, but of itself, and by its own proper force, has this effect. For if a master borrow money abroad, for the necessities of the ship and so apply the same, and no instrument of bottomry or hypothecation is given, the law-merchant gives to the lender a lien on the ship for the amount, in addition to any remedy he may have at common law against the owner as his debtor for money borrowed.[1] And it is not easy to see, why an instrument executed between the parties, and intended to have this very effect, may not be permitted to do so.[2]

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[1] See Wainwright *v.* Crawford, 3 Yeates, 131, 4 Dall. 225. And it is said that the owner is liable for money borrowed in a case of necessity, although the necessity arose by the fault of the master. Descadillas *v.* Harris, 8 Greenl. 298.

[2] It has been said, that unless more than legal interest is charged by the contract, it is not a loan on bottomry. Leland *v.* The Medora, 2 Woodb. & M. 92, 107; The Mary, 1 Paine, C. C. 671. In The Emancipation, 1 W. Rob. 124, 130, Dr. *Lushington* said: "I am aware that it is not absolutely necessary that a bottomry bond should carry maritime interest, and that a party may be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and where the argument in support of the bond is, that the advance of the money was attended with risk, it is a material circumstance, that only an ordinary rate of interest should be demanded. It is impossible to conceive that any merchant carrying on his business with ordinary care and caution, would be content to divest himself of all security for the loan of his money but a bottomry bond, and ask no greater emolument than the ordinary interest of £6 per cent., if the repayment of such loan was to depend upon the safe arrival of the vessel at the port of her destination, after performing such a voyage." In this case only legal interest was stipulated for, and the repayment of the loan did not depend on the safe arrival of the vessel. The bond was held invalid. See also, Stainbank *v.* Fenning, 11 C. B. 51, 6 Eng. L. & Eq. 412; Jennings *v.* Ins. Co. of Penn., 4 Binn. 244. It does not appear very distinctly from the case of Selden *v.* Hendrickson, 1 Brock. C. C. 396, whether the bond was given on legal or on maritime interest, though the former seems to be the more correct view, the decree being for the amount of the bond with seven per cent. interest, that being the legal interest at the port where the bond was given; and *Marshall*, C. J., said: "In fact I can conceive no reason, why a master may not, for the success of the voyage, hypothecate the vessel to secure a debt carrying only legal interest, in any case where he might bind the owner personally." See also, The Brig Atlantic, 1 Newb. Adm. 514. In the case of The Hunter, Ware, 249, money was advanced, on the personal credit of the owner, for refitting the ship, and a bond subsequently given. The court held, that the bond was invalid, but, on the libel being amended, rendered a decree for the sum advanced with legal interest. Mr. Justice *Ware* said: "If the court has authority to separate the good from the bad, and to reduce the maritime premium when an oppressive advantage has been taken of the necessities of the borrower, is it quite certain that it may not, in the exercise of its equitable powers, render judgment, in a case like the present, for the principal sum advanced with land interest?" See also the remarks of Mr. Justice *Story* in the case of The Virgin, 8 Pet. 538, 550. But in the case of The Brig Ann C. Pratt, 1 Curtis, C. C.

It is to be remarked, however, that a bottomry bond becomes payable not only when the ship arrives in safety, but also on some other contingencies, as when the voyage or adventure is broken up and terminated by a third party,[1] by the owner, or by his servant the master, by a voluntary and unnecessary act, in any way whatever; as by deviation;[2] or by a sale;[3] or by an intended wreck, or any intentional loss of the ship.[4] It is not

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340, where a sum of money was advanced on the faith of a bond, and subsequently a bond was made out in which a much larger sum was inserted, in order to deceive the underwriters, and two sets of accounts and vouchers were made out, Mr. Justice *Curtis* held the bond invalid on the ground of fraud, and also was of the opinion that the libellants had no lien *in rem* on the vessel for the amount actually advanced, on the ground that the parties contracted solely with reference to the bond, and did not intend that a lien should exist on the ship as a security for the simple loan. This case was affirmed on appeal, on the ground of fraud, Carrington *v.* Pratt, 18 How. 63. In The William and Emmeline, 1 Blatchf. & H. Adm. 66, the instrument, purporting to be a bottomry bond, bound the ship for a certain sum with simple interest, which was to be paid at all events. Mr. Justice *Betts* held, that, though this was not in strictness a bond, yet the vessel was liable *in rem*.

[1] Greely *v.* Smith, 3 Woodb. & M. 236.

[2] 2 Emerigon, Traité à la Grosse, ch. 8, § 4; Harman *v.* Vanhatton, 2 Vern. 717; Western *v.* Wildy, Skin. 152; Williams *v.* Steadman, id. 345. In Wilmer *v.* The Smilax, 2 Pet. Adm. 295, note, the bond was given for a specific voyage, which was never commenced, but the vessel performed another. Held, that the right of the owner to demand his money back was complete the moment the vessel sailed on the new voyage. But a deviation from necessity will not have this effect. The Armadillo, 1 W. Rob. 251.

[3] The Brig Draco, 2 Sumner, 157.

[4] In Pope *v.* Nickerson, 3 Story, 465, the vessel put into an intermediate port, having received damage, and was sold by the master. Subsequently she was repaired by the vendee and made a voyage to the United States. Mr. Justice *Story* said, p. 486: "The next question is, whether, in the events detailed in the statement of facts, and the evidence, the money on the bottomry bond became due, and payable to the lender? I am of opinion that it did become due. The voyage was not completed from any incapacity of the schooner to perform it; and in point of fact, she did, after being repaired, return safely to the United States. The voyage was broken up by the master voluntarily, upon the ground, that the schooner was not worth repairing for the voyage, because the expense of the repairs would exceed her reasonable value, or what ought, with reference to the interests of the owners, to be expended upon her, to enable her to carry the cargo to the port of destination. I do not say, that the master acted unwisely or improperly, under all the circumstances, in coming to this conclusion. Perhaps it was exactly what the owners might have done, if they had been personally present. If the owners had so abandoned the voyage, being personally present, because their interest would have been injuriously affected by not so doing; what ground could there be to say, that the bottomry bond should not be paid? See also, Thomson *v.* Royal Exch. Ass. Co., 1 M. & S. 30; The Dante, 2 W. Rob. 427; The Catherine, 1

necessary to say in the bond, that the ship is to be delivered or made over to no other use or purpose whatever, until payment of the bond is made, for the law implies this.[1] And where there are no laches on the part of the lender, his lien will be upheld even against a *bonâ fide* purchaser without notice.[2]

If marine interest is requisite to a bottomry loan, it may be presumed to be included in the principal sum.[3] The bond should describe sufficiently the risk which the lender assumes. This is, generally, the loss of the ship by the perils of the sea; and any such words as "the bond is gone if she does not arrive," or "if she is lost," or "the money to be paid after her safe arrival," are sufficient to indicate this. The risk must be such as justifies maritime interest;[4] and if the ship be lost by a peril, or from a cause not enumerated or implied, the debt survives, even with the maritime interest; as if the ship be lost through the misconduct of the master or owner.[5]

B. *Of Bottomry Bonds made by the Owner.*

Bottomry bonds are often made, in this country, by the owner, in the home port.[6] Nor is any necessity whatever requisite, as

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Eng. L. & Eq. 679; The Elephanta, 9 Eng. L. & Eq. 553; Thorndike *v.* Stone, 11 Pick. 183; Wallis *v.* Cook, 10 Mass. 510.

[1] The Brig Draco, 2 Sumner, 157.

[2] Wilmer *v.* The Smilax, 2 Pet. Adm. 295, note; The Brig Draco, 2 Sumner, 157; The Catherine, 1 Eng. L. & Eq. 679. See also the judgment of Mr. Justice *Powell*, in Trantor *v.* Watson, 6 Mod. 11, 13.

[3] The Mary, 1 Paine, C. C. 671. "This," however, Mr. Justice *Woodbury* remarks, "makes the question of interest a nose of wax." Greely *v.* Smith, 3 Woodb. & M. 236, 257.

[4] See cases ante, p. 407, note 1.

[5] See ante, p. 409, notes 2, 3, 4.

[6] Wilmer *v.* Smilax, 2 Pet. Adm. 295, note; The Brig Draco, 2 Sumner, 157; Thorndike *v.* Stone, 11 Pick. 183; Greeley *v.* Waterhouse, 19 Maine, 9. In The Duke of Bedford, 2 Hagg. Adm. 294, the bond was given by the owner of the ship, who was on board, at a foreign port. The master was also on board and received the supplies as necessary, but refused to sign the bond. A suit to dispossess the captain had previously been instituted. The court held, that the bond was valid. See also, The Barbara, 4 Rob. Adm. 1; The Mary, 1 Paine, C. C. 671. And if, in such a case, the owner is also master, although he professes to contract as master, he confers the same rights as if he gave the bond as owner. The Ship Panama, Olcott, Adm. 343.

far as his own interest is concerned.[1] He may make such a bond hypothecating a vessel, before sailing on her first voyage, if he pleases. It is then nothing more than a borrowing of money at extra interest, the lender assuming an extra risk. Sometimes this is in fact little more than nominal; the whole transaction being substantially a legal loan for usurious interest with security; for a party may lend ten thousand dollars on a bottomry for fifteen per cent. interest, when six per cent. is the legal interest, and three per cent. the usual premium for insurance on that voyage; and as a lender on bottomry has an insurable interest,[2] he may, by expending three per cent. interest, insure the ship and secure the payment of his loan at all events, and yet receive his twelve per cent. net for the use of his money. It is true that the uniform language of courts, both as to bottomry and respondentia bonds, is, that if the transaction be colorable only, and a mere pretence for getting usurious interest, it has none of the privileges given to these bonds, but is like any other loan on usury;[3] and this is a question for the jury. But there is no precise limit nor measure to marine interest; and in practice the interest must be far beyond the risks to be affected by the usury, as they would be measured by the mere rate of insurance.[4]

Bottomry bonds made abroad are generally made on the next voyage of the ship; which must be described with reasonable accuracy, or as near as the master can, but need not be precisely set forth.[5] When made at home, by the owner, they are frequently made on time, as for a year.[6]

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[1] Greeley *v.* Waterhouse, 19 Maine, 9; The Mary, 1 Paine, C. C. 671; The Brig Draco, 2 Sumner, 157. But see Greely *v.* Smith, 3 Woodb. & M. 236, 254. So of a respondentia bond. Conard *v.* Atlantic Ins. Co., 1 Pet. 386; The Brig Bridgewater, Olcott, Adm. 35; The Ship Panama, Olcott, Adm. 343.

[2] 1 Phil. Ins. § 300.

[3] Thorndike *v.* Stone, 11 Pick. 187; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 437.

[4] See ante, p. 407, note 2.

[5] And where the voyage is not under the direction of the party granting the bond, but is under the control of government, a bond is not invalid because the voyage is not described. The Jane, 1 Dods. 461.

[6] The Brig Draco, 2 Sumner, 157; Thorndike *v.* Stone, 11 Pick. 183; Bray *v.* Bates, 9 Met. 237.

C. *When the Master may make a Bottomry Bond.*

Although an owner may make a bottomry bond anywhere, and for any reason, the master can do so, only abroad and from necessity;[1] his power in this respect being exactly analogous to his power to sell; excepting that he may be justified, as we have already said, in giving a bottomry bond, by a less necessity than is required to authorize his sale of the ship. And the power belongs to any one who is lawfully master of the ship, however appointed;[2] as where he is appointed by the agent of the owners.[3] So, if he is appointed by the consignees of the cargo.[4] In one case where the captain was appointed by a foreign merchant, and gave a bond to him, the bond was held to be valid.[5] And in another case, the same was held in respect to a bond given to the charterer by whom the master was appointed.[6] So, too, the master of a transport, hired by government, and in the national service, may bottom her.[7] And the master of a belligerent ship that is in a foreign port by virtue of a cartel, may give a bond, and this may be enforced in the courts of the country to which the master is an enemy.[8] But a bottomry bond on a belligerent ship is discharged by the capture of the ship; and the courts of the captors will not enforce it as a subsisting

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[1] Sir Wm. Scott, in the case of The Gratitudine, 3 Rob. Adm. 240, 266, speaking of the necessity which will authorize the borrowing of money on bottomry by the master, says: "Necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases, is likewise *legal*. See also, The Nelson, 1 Hagg. Adm. 169; The Rhadamanthe, 1 Dods. 201; The Gauntlet, 3 W. Rob. 82, and cases *infra*.

[2] The Orelia, 3 Hagg. Adm. 75; The Boston, 1 Blatchf. & H. Adm. 309.

[3] The Kennersley Castle, 3 Hagg. Adm. 1. In this case it was doubtful whether the master was appointed by the agent of the owner, or by the agent of the underwriters, to whom the ship had been abandoned, or by both. The court were also inclined to the opinion that if he had been appointed by the underwriters alone, the bond would have been valid.

[4] The Alexander, 1 Dods. 278; The Rubicon, 3 Hagg. Adm. 9.

[5] The Tartar, 1 Hagg. Adm. 1. See also, The Brig Ann C. Pratt, 1 Curtis, C. C. 340, 344, and ante, p. 387, n. 4.

[6] Breed *v.* The Ship Venus, U. S. D. C., Mass., 1805, Abbott on Shipping, 159, n. 1.

[7] The Jane, 1 Dods. 461.

[8] Crawford *v.* The William Penn, Pet. C. C. 106, 3 Wash. C. C. 484.

claim even in favor of a subject of the capturing power.[1] After the master has ceased to act and another is appointed, he cannot give a bond, since he is *functus officio*.[2]

If a ship be captured and restored to the owners, it is a detention or interruption of the voyage, and not a loss of the ship;[3] but if it be captured, condemned, and sold, and the proceeds afterwards restored to the owner by decree, this is a loss of the ship, and the owner holds the proceeds free from any claim of the bond holder, on the bond;[4] and if, as has been said, there is no salvage in bottomry,[5] it would be difficult to give him any relief. But not only the justice of his claim, but some authorities indicate, what we must think should be the law, that he has such claim either by way of salvage, or in admiralty, on the general principles of equity.[6]

The necessity, though less than that requisite for a sale, must still be a real and a sufficient necessity. Therefore a master cannot hypothecate the ship for money borrowed for his own wants.[7] Nor can he as master pledge the freight for his own

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[1] The Tobago, 5 Rob. Adm. 218.

[2] Walden *v.* Chamberlain, 3 Wash. C. C. 290.

[3] Joyce *v.* Williamson, 3 Doug. 164. This was an action on a bond which contained a clause, that if the ship should be taken by the enemy, cast away, miscarry, or be lost, before her safe arrival at New York, the bond should be void. The ship sailed on her voyage, was captured, and afterwards retaken and carried to Halifax, where part of the cargo was sold for salvage and repairs. The vessel afterwards arrived at New York with the remainder of her cargo on board. The ship and freight were then worth the sum in the bond, but not worth that sum together with what had been laid out in repairs. The bond was pronounced for.

[4] Appleton *v.* Crowninshield, 3 Mass. 443.

[5] See post, p. 422.

[6] Appleton *v.* Crowninshield, 3 Mass. 443, 8 Mass. 340. In this case the vessel was captured and condemned. On appeal the decree was reversed and restoration ordered; and afterwards the value of the vessel and freight, with interest, was awarded to the owner. The court held that no action would lie on the bond, but intimated that an action for money had and received would lie against the owner. Accordingly such an action was brought, and the plaintiff recovered.

[7] King *v.* Perry, 3 Salk. 23. The following case is related by Loccenius, lib. 2, c. 6, § 12. The master of a ship being in a Spanish port, and having exposed the ship to seizure by his neglect to comply with a particular regulation of the country, entered into an agreement with a person who was supposed to possess sufficient influence to obtain the restitution of the ship, to pay him a very considerable sum with maritime interest, if he should procure the restitution of the ship, and she should afterwards return home in safety; and for securing the payment, executed an instrument in the nature of a bottomry bond. By the interest of the person with whom the agree-

use. But it is otherwise, if at the same time he is master and mortgagor in possession, and it is a question for the jury to decide in which capacity he acted.[1] And it must be the necessity of the ship; for he cannot make a bottomry of the ship for the benefit of the cargo.[2] That is a sufficient necessity which would induce an owner to do it if on the spot;[3] and therefore the master may hypothecate the vessel in a foreign country to enable him to return home, though the original voyage was broken up by capture and the compulsory sale of the cargo.[4] But this necessity of judging whether the owner would do it, does not exist if the owner himself can act or be consulted.[5] It is said that a master in a port of this country, may bottom his ship if her home port is in another state.[6] But this ruling cannot be sustained; for the master does not have the power of thus binding the ship to the payment of maritime interest, if the owner can be consulted, whether he be in the same, or in a neighboring state, or in another country. If the master be in the British provinces, and the owner in the state of Maine, within a day's sail or ride of him, the master can have no such power. It must be a foreign port in the sense of a distant port;[7] this is sufficient; and it may therefore be the port of destination.[8]

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ment was made, the ship was restored, and afterwards returned home in safety; and he instituted a suit against the ship upon the instrument executed to him by the master. It was held that neither the ship nor her owners were chargeable. See also, Gibbs *v.* Sch. Texas, Crabbe, 236.

[1] Keith *v.* Murdoch, 2 Wash. C. C. 297.

[2] Fontaine *v.* Col. Ins. Co., 9 Johns. 29.

[3] The Fortitude, 3 Sumner, 228, 246.

[4] Crawford *v.* The Wm. Penn, 3 Wash. C. C. 484.

[5] See *infra*, n. 7.

[6] Selden *v.* Hendrickson, 1 Brock. C. C. 396. The vessel in this case belonged to Richmond in Virginia, and the bond was given in New York.

[7] In a case of necessity, where it is impossible to communicate with the owners, the master may give a bond, although the owners reside in the same country. La Ysabel, 1 Dods. 273. And in The Trident, 1 W. Rob. 29, where the owner had lived in Scotland, it was held that the master might give a bond at Plymouth, England, the owner having died insolvent, and his personal representatives declining to interfere. So the master may pledge the credit of the owners in a port of the country, in which they reside, if no communication can be had with them. Arthur *v.* Barton, 6 M. & W. 138; Robinson *v.* Lyall, 7 Price, 592. But not, if a delay for the purpose of communication would work no injury. Johns *v.* Simons, 2 Q. B. 425; Stonehouse *v.*

[8] Reade *v.* Comm. Ins. Co., 3 Johns. 352.

The master, for the same reason, has no such power if he have funds of the owner within his reach; or if he can borrow

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Gent, 2 Q. B. 431, n.; Beldon *v.* Campbell, 6 Exch. 886, 6 Eng. L. & Eq. 473. In The Rhadamanthe, 1 Dods. 201, Sir Wm. *Scott* was of opinion that Cork was a foreign port as respected England, though the point was not decided. And in The Barbara, 4 Rob. Adm. 1, Jersey was held a foreign port in regard to London. But these distinctions are now done away with, and the only question is whether the owners could have been consulted. Thus in The Oriental, 3 W. Rob. 243, 2 Eng. L. & Eq. 546, the vessel was at New York, and the owners at St. Johns, New Brunswick. There was a telegraph between the two places. The master gave a bond without consulting the owners. Dr. *Lushington* held the bond was valid, but, on appeal,, the judgment was reversed. Wallace *v.* Fielden, 7 Moore, P. C. 398. In the case of The Bonaparte, 3 W. Rob. 298, 1 Eng. L. & Eq. 641, a bond was given by the consent of the owners of the vessel on the ship, freight, and cargo. The shipper of the cargo was applied to, but refused to advance any money. It did not appear that the owners of the cargo had been notified. Dr. *Lushington* was of opinion that it was not necessary for the master to consult the owners of the cargo, and pronounced for the bond. On appeal the privy council remitted the case to allow evidence to be taken, as to what notice, if any, had been given to the owners of the cargo. Wilkinson *v.* Wilson, 8 Moore, P. C. 459, 36 Eng. L. & Eq. 62. The law is stated by the court, on p. 473, and p. 70, of the respective reports, as follows: "That it is an universal rule, that the master, if in a state of distress, or pressure, before hypothecating the cargo, must communicate, or even endeavor to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt." On the case being sent back, further evidence was taken; it appeared that the British consul had written, on behalf of the master of the vessel and his agent, to the consignees in England, informing them of the damage sustained by the ship, but making no application for money, nor referring to the necessity for repairs. The letter also requested instructions as to what should be done. No answer was returned. Dr. *Lushington* held that under these circumstances the owners of the cargo were bound by the bond. The Bonaparte, 20 Eng. L. & Eq. 649. On appeal his decision was affirmed. 8 Moore, P. C. 459, 483, 36 Eng. L. & Eq. 75. See also, generally, The Lochiel, 2 W. Rob. 34; The Wave, 4 Eng. L. & Eq. 589; Agricultural Bank *v.* The Bark Jane, 19 La. 1. In The Nuova Loanese, 22 Eng. L. & Eq. 623, a bottomry bond was granted by the master at the port where the owner of the cargo, who was also charterer of the ship, resided. Advertisements for the loan were published. This fact was known to the owner of the cargo, and he was also aware that the ship was unseaworthy, and that the cargo had been laden and unladen while the ship was in port. No direct communication, or application for advances, was made to him. Held that the bond was invalid as far as his interest was affected. — It is true that in the case of The William and Emmeline, 1 Blatchf. & H. Adm. 66, 71, Mr. Justice *Betts* held that Charleston, South Carolina, was a foreign port in respect to New York, yet this case was decided in 1828, when a long time was required for communication be-

the money on the personal credit of the owner; or if a consignee be there with funds of the owner, or any agent of the owner;[1] or, it is said, if the master has funds of his own.[2] If the master, in a foreign port, has funds of his own, which he wishes to use for a profitable mercantile purpose, it would be hard to require him to lend them to the owner for mere common interest, and yet there is no authority for permitting a master to take a bottomry bond to himself, or to charge in any way more than legal interest for the use of his money, whatever may be the degree in which that falls below actual compensation.

The master is not bound to take the money on board

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tween the two cities, and moreover, though a bond was given in the case, yet it was informal, and the case was decided on the ground that repairs furnished in another State constitute a lien on the ship.

[1] Tunno *v.* Ship Mary, Bee, 120; Boreal *v.* The Golden Rose, id. 131; Putnam *v.* Sch. Polly, id. 157; Sloan *v.* Ship A. E. I., id. 250; Forbes *v.* The Hannah, id. 348, Hopk. 176; Canizares *v.* The Santissima Trinidad, Bee, 353, Hopk. 185; Rucher *v.* Conyngham, 2 Pet. Adm. 295; Cupisino *v.* Perez, 2 Dall. 194; The Ship Lavinia *v.* Barclay, 1 Wash. C. C. 49; The Ship Packet, 3 Mason, 255; Ross *v.* The Ship Active, 2 Wash. C. C. 226; Walden *v.* Chamberlain, 3 Wash. C. C. 290; Patton *v.* The Randolph, Gilpin, 457; The Nelson, 1 Hagg. Adm. 169; The Rhadamanthe, 1 Dods. 201; The Sydney Cove, 2 Dods. 1, 7. In the case of The Virgin, 8 Pet. 538, the court held that if the necessity for the supplies and advances is once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. It was also held that it was not enough to show that there were funds at the port of distress, which ought to have been appropriated to the use of the ship, and that the master was justified in giving a bond if he could not obtain them, because, "the non-existence of funds, and the non-ability to get at them, must, as to the master, be deemed to be precisely equal predicaments of distress."

[2] In the case of The Ship Packet, 3 Mason, 255, 263, Mr. Justice *Story* said: "If the master has money of his own on board, sufficient for the ship's necessities, it is by no means certain, that he has a right in such a case to resort to the extraordinary measure of bottomry. In case of there being money of the owner of the ship on board, it is very clear, that he cannot resort to bottomry. And although I would not absolutely decide, that under no circumstances he could so resort, where he has sufficient money of his own on board; yet if he can, it must be in a case of a very peculiar character, and such as ought to induce the court to uphold it from great public principles." In Canizares *v.* The Santissima Trinidad, Bee, Adm. 353, the master had goods of his own on board, and could also have procured money from the intendant at the port of distress. Held, that he had no authority to give a bond. Same case on appeal, Cupisino *v.* Perez, 2 Dall. 194. But if this latter element had been wanting, we think that a bond given by him would be valid. See The William & Emmeline, 1 Blatchf. & H. Adm. 66, 72.

which belongs to the shippers, nor, perhaps, has he a right to do this.[1]

It is said that he cannot bottom the ship if a part-owner, or the agent of a part-owner, be present.[2] But this may be doubted; and certainly there can be no such inflexible rule.[3] The master is the agent of all the owners. And the presence and refusal of any one or more, ought not, *of itself*, to deprive the master of the power or relieve him from the duty of providing for the interests of all. But in such a case, the necessity must doubtless be particularly certain and pressing.

Nor can a master make this bond merely to secure former debts of the owner;[4] but might, perhaps, if it were the only

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[1] In the Ship Packet, 3 Mason, 255, it was objected that the master should not have given a bond, as he had specie dollars on board which belonged to some of the shippers. Mr. Justice *Story* said, p. 258: "The general principle is, that he (the master) is bound to act with a reasonable discretion. He is to get the necessary repairs done at as little sacrifice as is practicable. If he has money on board, and the use of that will be the least sacrifice, he ought to resort to it in the first instance. But there may be cases, in which the use of such money would be the greatest sacrifice that could be made, and the whole objects of profit in the voyage might be thereby defeated. Suppose a voyage to the East Indies or China, in which the principal outward property on board is Spanish dollars, and a disaster happens on the first passage, requiring repairs, the use of those dollars may be the most mischievous exercise of his discretion, and destroy the hopes of the voyage. . . . . In all these cases, therefore, much must be left to the master's discretion, and he must exercise it conscientiously for the general interest. If he acts *bonâ fide* and with reasonable care, the rights of the parties are bound up by his acts, although it should afterwards be found, that he had committed an error in judgment, and might have acted more beneficially in another manner."

[2] Patton *v.* The Randolph, Gilpin, 457. See also, Selden *v.* Hendrickson, 1 Brock. C. C. 396. Kent (3 Comm. 172) says, on the authority of Boulay Paty, Cours de Droit Com. Mar. tome 2, p. 271, that if only a minority of the owners are present, the captain's power remains good.

[3] In some cases not only has the bond been pronounced valid, where there was at the time an agent at the place, but it has been also held, that a master may give a bond to the agent himself. See post, p. 425, n. 2.

[4] Harry *v.* Ship John and Alice, 1 Wash. C. C. 293; Walden *v.* Chamberlain, 3 Wash. C. C. 290; Clark *v.* Laidlaw, 4 Rob. La. 345; The Aurora, 1 Wheat. 96; The Lochiel, 2 W. Rob. 34; The Osmanli, 3 W. Rob. 198; Smith *v.* Gould, 4 Moore, P. C. 21. But see The Mary Ann, 10 Jurist, 253, 4 Notes of Cases, 376, 390. In the case of The Ocean, 10 Jur. 504, 4 Notes of Cases, 566, A bought up several simple contract debts, due on account of a certain vessel. He afterwards advanced money on bottomry on the same ship, and repaid himself out of the money so advanced the sums which he had paid for the contract debts. Held, that as to this part of the transaction the bond was void. In Cohen *v.* Sch. Amanda, Crabbe, 277, the bond was given to a party on condition that he should assume the debts which the vessel owed. No question seems to have been made as to the validity of such a bond. Payment was contested on the ground that the debts had not been paid. The court held, that

way to liberate the ship from arrest and sale for those debts.[1] And if a bond, given by the owner, includes other and former debts, those debts are merged in the bond, and are discharged by whatever discharges the bond, and no other or former securities on those debts are enforceable by themselves, or available in any way excepting through the bond.[2]

The master may give a bond for the amount due in good faith for compensation for services rendered in a foreign port by a consul of the country, to which the ship belongs.[3]

D. *Of the Duty and Obligation of the Lender on Bottomry.*

As there must be a necessity to justify the master in making the bond, so the lender must see to it, that this necessity exists.[4]

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the defence should be clearly made out to contradict the *primâ facie* presumption afforded by the bond.

[1] See post, p. 423, n. 2.

[2] Bray *v.* Bates, 9 Met. 237.

[3] The Zodiac, 1 Hagg. Adm. 320. See also, The Cynthia, 20 Eng. L. & Eq. 623.

[4] Putnam *v.* Schooner Polly, Bee, Adm. 157; Gibbs *v.* Sch. Texas, Crabbe, 236; The Aurora, 1 Wheat. 96; The Boston, 1 Blatchf. & H. Adm. 309, 324; The Orelia, 3 Hagg. Adm. 75, 84; Heathorn *v.* Darling, 1 Moore, P. C. 5; The Royal Stuart, 33 Eng. L. & Eq. 602. In Walden *v.* Chamberlain, 3 Wash. C. C. 290, it was held, that the lender on bottomry ought always to prove the necessity for the advances, and that they were made to enable the master to prosecute his voyage, and that the necessity for such advances, or that they were made on the credit of the vessel, was never to be presumed. In Soares *v.* Rahn, 3 Moore, P. C. 1, s. c. The Prince of Saxe Cobourg, 3 Hagg. Adm. 387, the bond was given by the master, who was also a part-owner. The agent of the charterer, and sole owner of the cargo, was ready and willing to advance money. The bond holders were not aware of this, but they had made no inquiries in regard to it. The bond was pronounced invalid though the holders were the lowest bidders at the auction advertised by the master. The court said: "If the foreign merchant, after due inquiry, shall have reasonable ground for concluding that the repairs are necessary, and that the money cannot be raised on personal credit, then his security on the ship and cargo shall not be impeached, or invalidated, because it might happen, that notwithstanding his reasonable and *bonâ fide* inquiries, the repairs were not necessary, or the money might have been had on personal credit." But, although he is bound to show a reasonable case of unprovided necessity for the advance, yet he is not bound to inquire into the expediency of incurring the expense of the repairs with reference to the interest of the owner. Duncan *v.* Benson, 1 Exch. 537, 555; The Vibilia, 1 W. Rob. 1, 10. In the case of The Brig Bridgewater, Olcott, Adm. 35, it was held, that in an action on a bond, the production and proof of the execution of it will not entitle the holder to a decree in his favor; but he must show that a necessity existed for the expenditures, and he should exhibit an account of the items of expenses, etc. See also, Clark *v.* Laidlaw, 4 Rob. La. 345; The William and Emmeline, 1 Blatchf. & H. Adm. 66, 76; Thomas *v.* Osborn, 19 How. 22, 31, ante, p. 385, n. 3.

Probably the same rule would be applied as in the sale of a ship, and if a sufficient necessity seemed to the lender to exist, after all reasonable precaution and inquiry on his part, it would be enough; although in fact he were mistaken.[1] If he connives in any way at any fraud of the master, this avoids the bond in toto, nor has he any lien on the ship for the amount actually advanced;[2] but the fraud of the master or borrower does not have this effect if the lender were neither participant in, nor consusant of it;[3] nor is the lender bound to see that the master actually applies the funds thus raised to the ship's necessities.[4]

If the owner resists payment of the bond on the ground of the fraud of the lender, or because the master had, within his reach, either the funds or a sufficient personal credit of the owner, the *onus* is upon him to prove this; and there is even a presumption in favor of the lender, that he did make the proper inquiries and was reasonably satisfied of the necessity.[5] But it seems that the master is not a competent witness for the libellant, to prove the necessity of repairs; because a decree for the libellant on this ground, might be used by the master in a suit against him by the owner for making unnecessary repairs.[6] If the lender is in debt to the owner of the ship, he is bound to apply the amount due to the necessity of the ship, and cannot, by advancing it, create an independent claim against the owner, and bind the ship to this with maritime interest.[7]

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[1] The Ship Fortitude, 3 Sumner, 228, 249. See also Soares *v.* Rahn, 3 Moore, P. C. 1.

[2] The Nelson, 1 Hagg. Adm. 169, 176; The Tartar, id. 1, 14; The Brig Ann C. Pratt, 1 Curtis, C. C. 340; s. c. affirmed on appeal, Carrington *v.* Pratt, 18 How. 63.

[3] Atlantic Ins. Co. *v.* Conard, 4 Wash. C. C. 662, 1 Pet. 386.

[4] Scarborough *v.* Lyrus, Latch, 252, Noy, 95, 14 Vin. Ab. Hyph. (A.) pl. 2; The Ship Fortitude, 3 Sumner, 228; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 437; The Virgin, 8 Pet. 538, 553; The Orelia, 3 Hagg. Adm. 75, 84; The Jane, 1 Dods. 461, 464; The Royal Stuart, 33 Eng. L. & Eq. 602.

[5] The Ship Fortitude, 3 Sumner, 228; The Virgin, 8 Pet. 538; The Duke of Bedford, 2 Hagg. Adm. 294, 300; The Vibilia, 1 W. Rob. 1, 5; The Mary Ann, 10 Jur. 253, 4 Notes of Cases, 376.

[6] The Ship Fortitude, 3 Sumner, 228. But see the further remarks of Mr. Justice *Story*, on this point, in the same case, p. 264; and Furniss *v.* The Brig Magoun, Olcott, Adm. 55, 60. In this case Mr. Justice *Betts* held, that he was competent, especially if released. See also, Evans *v.* Williams, 7 T. R. 481, note; Rocher *v.* Busher, 1 Stark. 27; Milward *v.* Hallett, 2 Caines, 77.

[7] Rucher *v.* Conyngham, 2 Pet. Adm. 295; The Aurora, 1 Wheat. 96; Hurry *v.* The Ship John and Alice, 1 Wash. C. C. 293; The Hebe, 2 W. Rob. 146.

If the lender, from improper motives, connives with the master to send the ship on a new voyage, not authorized by the owner, this is a fraud which will defeat his bottomry bond.[1] But the power of the master is not limited to necessaries to complete his original voyage. He may thus raise money to perform any voyage he is authorized by law to undertake, if there be no collusion between him and the lender.[2]

E. *When Additional Security may be given to the Lender.*

It seems to be settled that the lender on bottomry may take other and additional securities for his debt, provided these securities are also discharged by any thing which discharges the bond. Thus they will only make the repayment more certain if the ship arrives, but will not give any claim to the money if the ship does not arrive.[3] This ruling seems to be inconsistent with what is sometimes said, that a bottomry bond cannot give, and never does give, any claim against the owner personally.[4] Practically

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[1] The Virgin, 8 Pet. 538; The Reliance, 3 Hagg. Adm. 66.

[2] The Virgin, 8 Pet. 538, 552; The Hunter, Ware, 249, 253. See also, The Tartar, 1 Hagg. Adm. 1; The Mary Ann, 4 Notes of Cases, 376, 381, 10 Jur. 253. In The Reliance, 3 Hagg. Adm. 66, the ship was freighted from London to Calcutta and back. The agents there, upon whom the master had a limited credit, and which he had exhausted, induced the master to undertake a series of voyages in defiance of the owner's instructions. The bond was given for advances made on one of these voyages. Held, that it was void, for if a necessity existed, it arose from the conduct of the parties in whose favor it was given.

[3] The Jane, 1 Dods. 461, 466; The Tartar, 1 Hagg. Adm. 1; The Nelson, 1 Hagg. Adm. 169, 179; The Kennersley Castle, 3 Hagg. Adm. 1; The St. Catherine, 3 Hagg. Adm. 250; The Emancipation, 1 W. Rob. 124, 129; The Ariadne, 1 W. Rob. 411, 421; The Lord Cochrane, 2 W. Rob. 320; The Hunter, Ware, 249; The Sch. Zephyr, 3 Mason, 341; Leland *v.* The Ship Medora, 2 Woodb. & M. 92, 100; Greely *v.* Smith, 3 Woodb. & M. 236; The Brig Atlantic, 1 Newb. Adm. 514. So if property is mortgaged to secure a bond, the mortgage is defeated by whatever avoids the bond. Thorndike *v.* Stone, 11 Pick. 183; Bray *v.* Bates, 9 Met. 237.

[4] Mr. Justice *Story*, in the case of The Virgin, 8 Peters, 538, 554, stated the law as follows: "In England and America the established doctrine is, that the owners are not personally bound except to the extent of the fund pledged, which has come into their hands. To this extent, indeed, they may correctly be said to be personally bound; for they cannot subtract the fund, and refuse to apply it to discharge the debt. But in that case the proceeding against them is rather in the character of possessors of the thing pledged, than strictly as owners. In the present case, the value of the ship, the only fund out of which payment can be made, falls far short of a full payment of the

it may not often give this claim, because there is the ship, which is ample security; and if the ship be not there and that security is lost, then the debt is paid, or, at least, the bond is discharged by that loss. This question is not without its difficulties, nor are we much aided in reference to it, by adjudication. It would seem, however, that by the ordinary bond of bottomry, the owners are not personally held. That is, they are usually so written as to confine the lender to the ship in any event, giving the owner the right to abandon the ship to the lender, on its safe arrival, and to exempt himself from further responsibility. We do not know that the parties might not make a different bargain; but the rule of the Supreme Court of the United States seems to confine the claim to the property.[1]

If a master destroys a ship, or if an owner causes it to be destroyed, there would then be a remedy against the wrongdoer personally; and so there would be, perhaps, whenever by the fault of the master or owner, the lender lost the security of the ship.[2]

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amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners. They are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since by our law he had no authority by a bottomry bond to pledge the ship, and also the personal responsibility of the owners. The consequence is, that the loss, ultra the amount of the fund pledged, must be borne by the libellant." See also, Cupisino *v.* Perez, 2 Dall. 194; The Ship Fortitude, 3 Sumner, 228, 230; Johnson *v.* Shippen, 1 Salk. 35, 2 Ld. Raym. 982; Benson *v.* Duncan, 3 Exch. 644, 656; Stainbank *v.* Fenning, 11 C. B. 51, 6 Eng. L. & Eq. 412; The Tartar, 1 Hagg. Adm. 1, 13; The Nelson, 1 Hagg. Adm. 169, 176. But see Greely *v.* Smith, 3 Woodb. & M. 236, 249.

[1] The eighteenth Rule of Practice in the Admiralty, prescribed by the Supreme Court, is as follows: "In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only, against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct, has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer." If the voyage is put an end to by the fraudulent act of the master, it would seem, therefore, that if no proceeds of the ship or cargo can be got at, the only remedy is against the master. See The Brig Ann C. Pratt, 1 Curtis, 351, per *Curtis*, J. Although, if the owner by his own act prevents the ship from arriving, then he is personally liable, as has been already said.

[2] We are not aware of any cases which would lead to the conclusion that an action against the owner can be sustained unless distinctly for his own wrong doing. The Elephanta, 9 Eng. L. & Eq. 553, is an important case on this point. There the bond was given on ship, freight, and cargo, and was not to be put in force in case the ship and her cargo should be lost, or should miscarry, or be cast away on the voyage. The

If the owner chooses to sell a wrecked or injured ship because her repairs will cost more than she will be worth, he may, by abandonment, make this a total loss against insurers; but not against a bottomry bond holder; for here there is no abandonment.[1] Nor, says Mansfield, is there any salvage or average upon a bottomry bond.[2] But the parties may stipulate that the bond holder shall be liable to contribute in general average.[3] And it is now very common to provide that he shall be liable both for average and salvage. In such a case he contributes only on the value of the property hypothecated without the addition of maritime interest,[4] and he is entitled to contribution and to salvage.

F. *Of a Bottomry Bond for Supplies or Repairs.*

If the master order the supplies and they are rendered, and the repairs made, and the bottomry bond given afterwards, this bond is good if it was originally intended to furnish the supplies on the credit of the ship, and to secure this by a bottomry bond;[5] but if the original purpose and understanding were to

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ship did not arrive at her port of destination, but was abandoned as for a total loss at Algoa Bay, where part of the cargo was sold, and the proceeds brought to England, and part put into another ship, and also brought to England. It did not appear that the ship could not be repaired. The bond was enforced against the proceeds of the ship, the cargo which had been sold, and against that transshipped. See also, Pope *v.* Nickerson, 3 Story, 465.

[1] Thomson *v.* Royal Exch. Ass. Co., 1 M. & S. 30; The Elephanta, 9 Eng. L. & Eq. 553; The Dante, 2 W. Rob. 427; Ins. Co. of Penn. *v.* Duval, 8 S. & R. 138; Pope *v.* Nickerson, 3 Story, 465.

[2] Joyce *v.* Williamson, 3 Doug. 164. See also, Walpole *v.* Ewer, Park, Ins. 565, per Lord *Kenyon*, C. J.; Robertson *v.* United Ins. Co., 2 Johns. Cas. 250, 252, per *Kent*, J. By the ordinance of Hamburg the lender does not contribute to general average. Tit. 8, art. 2; 2 Magens, No. 931. In France the law is the other way. Code de Commerce, n. 141; Le Guidon, c. 19, a. 5. So in Denmark. Walpole *v.* Ewer, Park, Ins. 565.

[3] Ins. Co. of Penn. *v.* Duval, 8 S. & R. 138.

[4] Gibson *v.* Philadelphia Ins. Co., 1 Binn. 405.

[5] The Virgin, 8 Pet. 551, 552; La Ysabel, 1 Dods. 273, 276; The Augusta, 1 Dods. 283; The Alexander, 1 Dods. 278, 280; The St. Catherine, 3 Hagg. Adm. 250; The Rubicon, 3 Hagg. Adm. 9; Furniss *v.* Brig Magoun, Olcott, Adm. 55, 63; The Ship Panama, Olcott, Adm. 343, 350. In the case of The Vibilia, 1 W. Rob. 1, it was held that, where advances were made on the personal credit of the master, or owners, and a bond subsequently given, the bond was void, but that where advances

furnish them on the personal credit of the master, or of the owner, either or both, without reference to the ship, it would seem to be settled that the bargain cannot be changed and a bottomry bond given for this existing debt with extra interest.[1] If, however, the ship should be held in the foreign port for this debt, and there was no way of liberating her, but by this bottomry, we should say that it would be valid, if made in good faith.[2] So we hold, generally, that if the liberation of the ship

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had been made, without direct evidence as to any original understanding, or contract, and followed by a bond, the law presumed that a bond was contemplated in the first instance. In the case of The Trident, 1 W. Rob. 29, on the arrival of the vessel at the port of distress, it was necessary to defray certain minor expenses, such as pilotage dues, etc. These were paid by a firm there without any contemplation of a bottomry bond. Subsequently, further expenses being required, the same parties were applied to, but refused to advance more money unless a bond was given. This was done for the whole amount, including the sums first advanced. The bond was held valid *in toto*. See also, Smith *v.* Gould, 4 Moore, P. C. 21. In The Gauntlet, 3 W. Rob. 82, when the vessel arrived at the intermediate port the crew were in a state of mutiny, and the master dispossessed of his command. The authorities of the port took the master and crew on shore, and kept them in close confinement. It was held that a bond given for the expenses incurred by a person employed by the British vice-consul to investigate into the mutiny, and reinvest the master in his command, was valid, although no mention was made of a bond at the outset of the inquiry, and the bond was taken immediately before the vessel sailed from the port. The court said: "In the course of the argument it was pressed upon the court, that when Mr. Jeffries first stepped forward to render his assistance, there was no express mention that he was to be reimbursed by a bond of bottomry. I do not think that this fact, under the peculiar circumstances of the case, can invalidate the subsequent bottomry transaction. It is very true, that upon general principles, where work has been done, or advances made upon personal security in the first instance, the party doing the work, or making the advances, is not at liberty to turn round upon the owners, and cover himself by exacting a bond of bottomry from the master; but what is the case here? The expenses incurred by this vessel, and for which this bond was given, were incurred when the master was out of possession of the ship, and when he was incompetent to take charge of her, or to do any thing in her behalf."

[1] The Hunter, Ware, 249; Sloan *v.* Ship A. E. I., Bee, Adm. 250; Rucher *v.* Conyngham, 2 Pet. Adm. 295; The Augusta, 1 Dods. 283; The Hero, 2 Dods. 139, 147; The Hersey, 3 Hagg. Adm. 404, affirmed Gore *v.* Gardiner, 3 Moore, P. C. 79; The Wave, 4 Eng. L. & Eq. 589. See also, The Ariadne, 1 W. Rob. 411, 419.

[2] In The Aurora, 1 Wheat. 96, Mr. Justice *Story* said: "It is undoubtedly true, that material men, and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right. And it must be admitted that, in such a case, a *bonâ fide* creditor, who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds, or credit, to redeem the ship from such arrest." The point, however, was not decided. In The Vibilia, 1 W. Rob. 1, it was held that the

from arrest for debt, is a good cause for bottomry, yet if the attaching creditor is himself the obligee, the bond is invalid.[1]

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fact, that a lien existed on the ship by the law of the country in which the bond was given, was an important ingredient, and furnished a presumption in favor of bottomry, and against personal credit. But we are not inclined to carry the law further than this, and to say that in all cases the arrest of the ship for debt would authorize the giving of a bond by the master. In The Aurora, above cited, it was held that a mere threat to arrest the ship for a preëxisting debt, would not justify the master in giving a bond. See also, The Boston, 1 Blatchf. & H. Adm. 309, 324. It is true that in the case of Smith *v.* Gould, 4 Moore, P. C. 21, Lord *Campbell* used language which is inconsistent with this view of the case. The vessel, bound for New York, had a very long passage, and having got out of water, the persons on board used some cases of porter belonging to a freighter. On arrival the consignee threatened to sue the ship for the non-delivery. The captain raised money, to pay for the damage done, by the bond on which this suit was brought. It did not appear in evidence whether by the laws of New York the ship could have been arrested, and the bond was pronounced to be void. But Lord *Campbell* expressed his opinion that a master might hypothecate his vessel in any case where it might be arrested, and sold for a demand for which the owner would be liable. The whole subject was discussed at great length by Dr. *Lushington*, in the case of The Osmanli, 3 W. Rob. 198, and a conclusion contrary to that of Mr. Justice *Story* arrived at. The Osmanli was arrested for debts due from her owner, on account of advances made for The Osmanli, and for other ships of the same owner, on former voyages. The arrest was legal in all respects, though of course the ultimate consequences of it could not be determined. The captain borrowed money on bottomry to release the vessel, the lender knowing it was to be so applied. The bond was held to be invalid. In The Augusta, 1 Dods. 283, 288, Lord *Stowell* remarked: "It has been said that the party might, by the law of Russia, have detained this ship till the money was repaid; but I do not think that circumstance alone will be sufficient to convert this into a case of hypothecation. Ships might, in all cases, be detained on the same ground by the general law of Europe, and if the position, which has been laid down, were to be supported, it would go the length of turning every case into a case of hypothecation, or at least there would be a necessity of inquiring, in every case, into the state of the foreign law." However the law may be in regard to the arrest of the ship, it is clear that the fact of the master's being arrested will not be sufficient to authorize the giving of a bond, to raise money to procure his release, although he was arrested for a debt contracted for the vessel in his capacity of master. Smith *v.* Gould, 4 Moore, P. C. 21. See also, The Aurora, 1 Wheat. 96. It is obvious that these questions can only arise in regard to old debts. For if advances are made to the ship, they are either on the credit of the ship, or of the master or owner. If the latter, the ship could not be legally arrested, and if illegally, it is clear that no necessity would exist for the giving of a bond. If they are made on the credit of the ship, we have seen that a bond is valid, although given subsequently. The case of The Osmanli proceeds on the ground that as the master has no right to bottom for old debts, so he has not the right, when the ship is arrested for those debts.

[1] Thus Mr. Justice *Story* in the case of The Aurora, 1 Wheat. 96, 105, said: "Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favor of a third person, that a general creditor would be entitled to acquire a like interest. It would seem against the policy of the law to permit a party, in this manner, to obtain advantages from his contract for

G. *Of a second Bottomry Bond.*

If a master in a foreign port bottom his vessel, and then go to another port and make a new bottomry, the funds necessary to pay off the former bottomry may enter into the new one. But then the holders of the second bond will stand as the assignees of the first; so far at least, that if the first bond was not good because not necessary, or for any fraud in the lender, the second bond will not be good for so much as paid off the first bond, although the second bond holder advanced the money in good faith.[1]

H. *To whom a Bottomry Bond may be made.*

Whether a bottomry bond may be given to a consignee of the ship, or to any party holding to the ship-owner the relation of agent to principal, has been much controverted. Upon the whole, however, we are decidedly of opinion, both from the reason and justice of the case, and from the authorities, that such a bond may be valid.[2] Undoubtedly it would come into

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which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practise gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country."

[1] Dobson *v.* Lyall, 8 Jur. 969; Walden *v.* Chamberlain, 3 Wash. C. C. 290; The Aurora, 1 Wheat. 96. See also, Conard *v.* Atlantic Ins. Co., 1 Pet. 436, where the loan was applied in discharge of a prior loan. Mr. Justice *Story* said: "In our judgment, that makes no difference, as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased, and the mode of its application, if it be otherwise *bonâ fide* and legal, does not change the posture of the rights of the lender." This was a case of a bond given by the *owner* of the cargo. So in Greeley *v.* Waterhouse, 19 Maine, 9, it was held that where a bottomry bond is given by an owner to secure an old debt, if that was to be discharged to the extent of the bond, the bond might be regarded as a new loan on bottomry, but not where the bond was intended merely as a collateral security for the old debt. In Merwin *v.* Shailer, 16 Conn. 489, the vessel put into Charleston for repairs. The master borrowed a sum of money on bottomry from A. Subsequently, another master was appointed who borrowed an equal sum from B, and took up the first bond. The court held that the owners were not liable for this last, such change of responsibilities not growing out of the necessities of the voyage, or the safety of the vessel.

[2] If the consignee has funds in his hands belonging or due to the owners of the vessel, it is well settled that he cannot lend his own money on bottomry. Hurry *v.* The

court, under circumstances which, if not exciting suspicion, should at least call for unusual care and vigilance in ascertain-

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Ship John & Alice, 1 Wash. C. C. 293; The Ship Lavinia *v.* Barclay, 1 Wash. C. C. 49; Ross *v.* The Ship Active, 2 Wash. C. C. 226; Reade *v.* Commercial Ins. Co., 3 Johns. 352. It is true that in the case of Liebart *v.* The Ship Emperor, Bee, Adm. 339, 344, the bond was given to consignees, and pronounced invalid, and that on appeal the court said: "No authority is shown, and none can be shown, because none ought to be, that an hypothecation can be made to a consignee: great mischiefs might arise if captains could hypothecate to consignees." But these remarks are to a great degree *obiter*, for there were special circumstances in the case which were relied on, which would have doubtless rendered the bond invalid, even if it had been given to a stranger. That a bond may be given to a consignee there can be no doubt. See The Ship Lavinia *v.* Barclay, 1 Wash. C. C. 49; Ross *v.* Ship Active, 2 Wash. C. C. 226. In Rucher *v.* Conyngham, 2 Pet. Adm. 307, the court said: "The facts of this case, in a great degree, if not entirely, supersede the necessity of discussing the question of the propriety of a consignee taking a bottomry bond from the master, in virtue of the power given him merely as master. I will only say, that in general, I think there is a legal impropriety and invalidity in such bonds. The practice may lead to abuses and collusions, to charge the owner with unwarrantable and unnecessary usurious premiums. But I will not say that there may not be cases, where the consignee is not bound, more than any other lender, to advance for repairs, without taking the ship as security for a loan on maritime interest. A consignee not in the habit of dealing with or crediting an owner, and not having any goods, funds, or means of security at the time, seems not under any obligation to risk his property, without the usual and adequate compensation and security." In England, in the case of The Alexander, 1 Dods. 278, a bond given to the consignees of the cargo was pronounced valid. So in The Nelson, 1 Hagg. Adm. 169, where it was given to the consignee of the cargo, and the agent of the charterer, the consignee of the ship being at the port, but refusing to advance funds. See also, The Lord Cochrane, 2 W. Rob. 320. Lord *Stowell*, in the case of The Hero, 2 Dods. 139, 144, states the law as follows: "I will not take upon myself to lay it down as an universal proposition, that an agent may not, under any circumstances, take the security of a bottomry bond. Cases may possibly arise in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then surely be at liberty to hold hard, and to say, I give up the character of agent, and as any other merchant might, to lend his money upon bond, to secure its payment, with maritime interest. If in such a case, he gives fair notice that he will not make any further advances as agent, and affords the master an opportunity of trying to get money elsewhere, and the master is unable to do so, but is obliged to come back to him for a supply, then he is fairly at liberty, like any other merchant, to advance the money on a security that is more satisfactory to himself. I will not say that the case might not go further. If the agent had given credit for all the disbursements of the ship, and found, contrary to his expectations, that they amounted to more than he calculated, and went beyond any advances which he might reasonably be called upon to make on the mere personal credit of his employers, and if there was no time to look to other quarters for assistance, he might possibly be justified in resorting to this species of security, giving the earliest notice of the necessity under which he acted. Under such circumstances he might not, perhaps, be out of the reach of the protection which a bottomry bond

ing that there was a sufficient necessity for the loan, and entire good faith in the transaction. If these are found to exist, then we must say that such a bond may be valid, or that a consignee must advance his own funds without the interest or security any other person would be entitled to, for which there is no law, or else that a consignee who is willing to save a ship on fair terms, must let her perish, because he cannot be treated as well as a stranger. Perhaps it should be shown that the master, or other agent, could not raise money on the same terms from another party; and, with better reason, the consignee might lose his remedy on the bond if it could be shown that the funds might have been raised on better terms from another. He should be held to all the strict accountability of an agent;[1] but if every thing which good faith could require

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would afford him." And Dr. *Lushington*, in the case of The Oriental, 3 W. Rob. 243, 2 Eng. L. & Eq. 546, uses language no less strong. He says: "That an agent cannot, under any circumstances, take a bond of bottomry upon the vessel in whose service he is employed, is a proposition which cannot, I conceive, be universally maintained. There can be no obligation upon a merchant, merely because he takes upon himself the character of agent, to advance to any required extent his own funds for the repairs and outfit of a vessel consigned to his charge. It forms no part of the contract into which he enters when he becomes an agent, that he should make such advances, and it must rest with himself to judge of the prudence of so doing, according to the circumstances in which the vessel is placed." Though this case was reversed on appeal, yet it was on another ground. Wallace *v.* Fielden, 7 Moore, P. C. 398. See also, The Nuova Loanese, 22 Eng. L. & Eq. 623. In Clark *v.* The Bark Leopard, U. S. D. C., Mass., 4 Law Reporter, 153, the libellant, who was also the consignee of the vessel, employed her on various voyages, without accounting for the earnings, and in other respects acted fraudulently, and it was accordingly held that he could not recover.

[1] This is well illustrated by the late case of The Royal Stuart, 33 Eng. L. & Eq. 602. The agents for the vessel at Australia, put on board, for England, a quantity of damaged flour. All parties believed that it might be safely conveyed without risk to the ship, or those in it. But it became heated before the vessel left port and was necessarily relanded. The agents also supplied the ship with necessaries for the homeward voyage, and advanced a large sum of money to the master. They then took a bond covering the cost of supplies, the expense of relanding the flour, and the money advanced to the master. The bond was admitted, but on reference to the registrar and merchants, the charges for relanding the flour, and the amount of money advanced to the master, were disallowed. The case came before the court on a motion to confirm the report of the registrar. It was held that the agents had no right to ship their own property on board, which from its nature might be dangerous, and then, when it became so, charge the owner with the expense of relanding it. Dr. *Lushington* said: "It must be remembered always that this is a bond taken by the agent of the ship, whose duty it is to protect the ship from all improper charges; and though it is true in

were in the case, we do not know why the bond might not be valid, even if the consignee had appointed the master who made it.[1]

We should answer the question, whether a valid bottomry bond may be made to a charterer, in the same way. Such a bond would be open to suspicion, and would require the most careful scrutiny; but would be valid if wholly unimpeached.[2] It is, however, decided on good authority, and for good reason, that a bottomry bond to a part-owner, which binds the shares of the ship belonging to the other owners to payment with extra interest for repairs, is not valid.[3]

I. *A Bond may be good in part and void in part.*

A bottomry bond may be given for a sum of money composed of several items, for a part of which such a bond may lawfully be given, and for a part of which it may not be given. The bond will then be good *pro tanto;* for it seems to be quite well settled that it may be good in part and void in part.[4] If many claims are added together to make up the amount for which the bond is given, a court in which enforcement of it is sought, will analyze these claims, requiring them to be severally proved; and will decree in favor of those only, or that part of the bond only, which is sustained by sufficient proof and is not open to

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law that an agent may take a bottomry bond, yet when he does so, all the transactions connected with it require the utmost vigilance of the court, for the obvious reason, that when the agent and lender are blended in one, the owner is deprived of the protection expected from a paid agent." In regard to the money there was no evidence that it was wanted by the master, and the court therefore held that as the lender was bound to see that a necessity existed, the bond was so far invalid.

[1] See ante, p. 412, n. 4.

[2] Breed *v.* The Ship Venus, U. S. D. C., Mass., Abbott on Shipping, 159, note.

[3] Patton *v.* The Schooner Randolph, Gilpin, 457.

[4] The Augusta, 1 Dods. 283; The Hero, 2 Dods. 139; The Tartar, 1 Hagg. Adm. 1; The Nelson, id. 169, 176; The Heart of Oak, 1 W. Rob. 204, 214; The Ocean, 10 Jur. 504; Dobson *v.* Lyall, 3 Mylne & C. 453, n., 8 Jur. 969; The Royal Stuart, 33 Eng. L. & Eq. 602; Smith *v.* Gould, 4 Moore, P. C. 21; The Brig Hunter, Ware, 249; The Ship Packet, 3 Mason, 255, 259; The Virgin, 8 Pet. 538; The Brig Bridgewater, Olcott, Adm. 35, 37; Furniss *v.* The Brig Magoun, Olcott, Adm. 55.

objection.[1] It is doubtful whether courts of common law have this power; we think they have not.[2]

J. *Of the Hypothecation of the Freight.*

A bottomry bond which hypothecates the ship does not, of necessity, hypothecate the freight also.[3] But the master has the same power over the freight that he has over the ship, and may hypothecate the freight under the same circumstances, for the same reasons, in the same way, and by the same bond.[4] And a general hypothecation of the freight by the master in a foreign port, will be construed to include all the freight of the whole voyage, whether earned at the time the bond is made or not,[5] provided it have not been paid to the master or owner.[6]

K. *Of the Construction of a Bottomry Bond.*

A bottomry bond is preferred to any other lien whatever,[7] ex-

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[1] The Aurora, 1 Wheat. 96. See also cases in preceding note, and The Osmanli, 3 W. Rob. 198, 219. In this case Dr. *Lushington* stated that he was not prepared to say that in all cases where a small amount of the sum claimed is properly a subject of bottomry, and the larger proportion of the demand is not properly the subject of a bond, that the court would be under the necessity of pronouncing for that smaller amount. Such a practice might lead to fraud, inconvenience, and litigation.

[2] See The Hero, 2 Dods. 139, 147; The Ship Packet, 3 Mason, 255, 259.

[3] La Constancia, 4 Notes of Cases, 285; The Mary Ann, 4 Notes of Cases, 376, 383, 10 Jur. 253. See also, The Draco, 2 Sumner, 157; Crawford *v.* The Wm. Penn, 3 Wash. C. C. 484.

[4] The Gratitudine, 3 Rob. Adm. 240, 274; The Nelson, 1 Hagg. Adm. 169; The Augusta, 1 Dods. 283; Murray *v.* Lazarus, 1 Paine, C. C. 572; The Ship Packet, 3 Mason, 255. See also, cases in subsequent notes.

[5] The Schooner Zephyr, 3 Mason, 341. In The Jacob, 4 Rob. Adm. 245, the freight of a subsequent voyage, was, under the circumstances of the case, held liable for the bond. The freight is liable to contribute *pro rata* with the ship, although the ship and freight belong to different persons. The Dowthorpe, 2 W. Rob. 73. And freight earned from subshippers of goods by permission of the charterers of the whole ship, is liable, as against them, in payment of a bottomry bond given at the port of the charterers, for advances subsequent to the charter-party. The Eliza, 3 Hagg. Adm. 87.

[6] The John, 3 W. Rob. 170. See also, The Cynthia, 20 Eng. L. & Eq. 625.

[7] The Mary, 1 Paine, C. C. 671; The Duke of Bedford, 2 Hagg. Adm. 294, 304; The Mary Ann, 9 Jur. 94; The Orelia, 3 Hagg. Adm. 75, 83; The Hersey, 3 Hagg. Adm. 404, 407. See also, cases ante, p. 410, note 2. In the case of The Aline, 1 W. Rob. 111, a collision occurred, and the vessel, to the negligence of whose crew the collision

cepting only the lien of the seamen for wages;[1] and the lien of material men for repairs or supplies indispensable to her safety.[2] The reason of this rule is, that a bottomry bond saves the ship; for it is to be presumed that it was made from a strict necessity; and if it had not been made the other liens on it would have been worthless. The reason of the exception is, that the bottomry bond itself would never have brought the ship within reach of any persons having an interest in or a lien upon her, had she not been navigated home by the seamen. So, too, if there be several bottomry bonds on the same ship, the last takes precedence, and a latter over a former, on the same ground, that it is the last which saved the ship.[3] And if a bottomry bond

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was owing, put into Cowes for repairs. Application was made to D., a merchant of that port, for assistance in procuring the necessary repairs. D. declined unless the master would execute a bottomry bond for such sums as might be expended. This the master agreed to do. D. had no knowledge of the claim against the vessel. Part of the repairs were made prior to the arrest of the vessel for the damage done by the collision, and part subsequent. The court having pronounced the vessel in fault, she was sold by order of court, and the proceeds paid into the registry. D. having intervened for his claim, the question came before the court as to which claim should be preferred. Held, that D. was entitled to priority only to the extent of the increased value of the vessel arising from the repairs. The vessel in this case had not left Cowes when she was arrested, and no bond had been executed. The decree, therefore, is to be taken in connection with all the circumstances of the case; and Dr. *Lushington* expressly said that he could not hold that, universally, bonds given for repairs must give way to prior claims of damage.

[1] The Madonna D'Idra, 1 Dods. 37, 40; The Sydney Cove, 2 Dods. 1, 13; The Constancia, 4 Notes of Cases, 512, 10 Jur. 845, 850; The Louisa Bertha, 1 Eng. L. & Eq. 665; Blaine *v.* Ship Charles Carter, 4 Cranch, 328; The Virgin, 8 Pet. 538; The Hilarity, 1 Blatchf. & H. Adm. 90; Furniss *v.* The Brig Magoun, Olcott, Adm. 55, 66. In The Selina, 2 Notes of Cases, 18, it was held that wages earned antecedently to a salvage service would not be entitled to priority. And in The Mary Ann, 9 Jur. 94, Dr. *Lushington* is reported to have said: "Suppose the wages sued for had been, in part, wages on the outward voyage, before the bottomry bond was taken; then would arise a question of no small importance, namely, whether these wages would be entitled, as against the ship, to priority over the bottomry bond. I apprehend, not." But in the subsequent case of The Louisa Bertha, 1 Eng. L. & Eq. 665, where there were several voyages, the court held, that the lien of the seamen for their wages extended to all the voyages, they serving under a continuous contract.

[2] The Jerusalem, 2 Gallis. 345. See also, *Ex parte* Lewis, id. 483.

[3] The Exeter, 1 Rob. Adm. 173; The Sydney Cove, 2 Dods. 1; The Eliza, 3 Hagg. Adm. 87; The Trident, 1 W. Rob. 29; Leland *v.* The Medora, 2 Woodb. & M. 113; Furniss *v.* The Brig Magoun, Olcott, Adm. 66; Code de Commerce, book 2, tit. 9, art. 323. In the case of The Betsey, 1 Dods. 289, the first bond was given on the 12th of March, and on the 17th of the same month, more money being required, another bond was given to another party. The preference was given to the latter bond, al-

holder discharges the demands of the seamen for their wages, he perhaps stands as assignee of their claims, and has their lien for wages, in connection with his own.[1] It may be doubted, however, whether the principle of novation does not apply so far as to require the assent of the owner, or some security to protect his interests.[2] If the lender had, under the same necessity and to liberate the ship, repaid advances made for indispensable repairs or supplies, he could include them in his claim.[3]

For the reason that a bottomry bond is supposed to have saved the ship, it is construed very liberally by all courts, and if possible the intention of the parties is carried into effect.[4] At

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though there was so slight a difference as to date, and although the bonds were executed at the same place, and the money was lent on the same voyage and on the same risk. In The Constancia, 4 Notes of Cases, 285, there were three bonds. The first and third were on the ship alone, and the second on the cargo alone. The first and second were of the same date. The court held, that the two on the ship should be paid out of the proceeds of the ship alone. But though the second was on the cargo alone, yet the ship and freight were primarily liable for it, and what remained of the proceeds of the ship should be first applied to the payment of it, then the freight, and lastly, the cargo. So in The Trident, 1 W. Rob. 29, where there were four bonds, Dr. *Lushington* said: "I also take it to be clear, that in a case where there are several bonds, and one is secured on the ship and freight, and another upon the ship, freight, and cargo, according to every principle of equity, and this court sits as a court of equity, I am bound to marshal the assets, and say you shall satisfy your claim from the cargo, and you yours from the ship and freight." This privilege of priority is confined to bonds given under necessity in a foreign port.

[1] The Virgin, 8 Pet. 538, 553; The Kammerhevie Rosenkrants, 1 Hagg. Adm. 62. But see The Adolph, 3 Hagg. Adm. 249. In The Cabot, Abbott, Adm. 150, it was held, that the bond holder had the right to pay the wages and stand in the place of the seamen, but that he could not exact of them a formal assignment of their wages, nor the payment of his proctor's fees; and on an offer to satisfy their wages he could not require them to defer the prosecution of their demands until he should choose to institute a suit on the bond.

[2] See Dr. *Lushington's* remarks in the case of The John Fehrman, 20 Eng. L. & Eq. 648.

[3] See Miller *v.* The Snow Rebecca, Bee, 151.

[4] Simonds *v.* Hodgson, 3 B. & Ad. 50; The Alexander, 1 Dods. 278; The Rhadamanthe, id. 201; The Hero, 2 id. 139; The Calypso, 3 Hagg. Adm. 162; The Reliance, id. 66, 74; The Schooner Zephyr, 3 Mason, 341; Pope *v.* Nickerson, 3 Story, 465, 486. In The Jacob, 4 Rob. Adm. 245, 249, Lord *Stowell* said: "The disposition of this court would certainly be, to uphold the efficacy of bonds of this nature, as far as is consistent with law. They are bonds of great sanctity, and highly necessary in mercantile affairs, and, therefore, the court would be inclined to support them, as far as the justice of the case will admit." See also, The St. Catherine, 3 Hagg. Adm. 250, 253; Smith *v.* Gould, 4 Moore, P. C. 28; The Mary Ann, 10 Jur. 253, 4 Notes of Cases, 376.

the same time, because they are made from necessity, or, as is sometimes said, are creatures of necessity and distress,[1] they are very carefully watched, and, while the lender is protected against any formal or technical objections if he has acted in good faith, the ship-owner is also protected against oppression.[2] Admiralty courts are especially disposed to apply to all questions which come before them on contracts of bottomry, principles and considerations of equity.[3] Thus, although there is no precise limit to what is called maritime interest, and in some cases a very large percentage is allowed,[4] yet if it be apparent and certain that the lender took advantage of the borrower's necessities to make him pay for the money far more than it was worth, a court of admiralty will interfere, and reduce the interest within proper bounds.[5] It has been held, that if the voyage is de-

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[1] The Kennersley Castle, 3 Hagg. Adm. 1, 7.

[2] In The Vibilia, 1 W. Rob. 1, 5, Dr. *Lushington* said: "Before, however, entering upon the discussion of circumstances peculiar to this case, it may be not unadvisable to consider what is meant by that *dictum* so often cited, and again urged in this cause, that bottomry bonds are of a high and sacred character. All legal engagements, all contracts sanctioned by the law, are sacred; that is, they are to be enforced by every court of law and equity; the expression, therefore, so often repeated must, I think, have some other meaning more appropriate and peculiar to the subject itself, than merely to denote the character which a bottomry bond enjoys in common with other legal instruments. I may also further observe, that this expression, so often quoted, cannot refer to priority of payment, for of that, when the bond is admitted to be valid, no doubt is ever entertained. The only meaning, which, with satisfaction to my own mind, I can attach to this observation, is, that where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, and the bond in all essentials apparently correct, then that under such circumstances the strong presumption of law is in favor of its validity, and it shall not be impugned save when there shall be clear and conclusive evidence of fraud: or where it shall be proved beyond all doubt, that, though purporting in form to be a bottomry transaction, the money was in truth and in fact advanced upon different considerations." See also, Greely *v.* Smith, 3 Woodb. & M. 236, 257.

[3] See The Cognac, 2 Hagg. Adm. 377, 388; The Trident, 1 W. Rob. 29, 35; The Heart of Oak, id. 204, 215; Packard *v.* The Sloop Louisa, 2 Woodb. & M. 48, 60.

[4] See ante, p. 407, note 2.

[5] La Ysabel, 1 Dods. 273; The Zodiac, 1 Hagg. Adm. 320, 326; The Cognac, 2 Hagg. Adm. 377; The Boddington's, 2 Hagg. Adm. 422; The Heart of Oak, 1 W. Rob. 204, 215; The Lord Cochrane, 2 W. Rob. 320, 336; The Hunter, Ware, 249; The Ship Packet, 3 Mason, 255, 260; Wilmer *v.* The Smilax, 2 Pet. Adm. 295, note. In England the practice is for the court to refer the items for which the bond was given, together with the premium, to the registrar and merchants. La Ysabel, *supra;* The Lord Cochrane, *supra.* When their return is made, the court has the power to

feated before the marine risk has begun to run, only legarrs, he est can be allowed.[1] So, too, while the lien of the lender is p. served very carefully, and goes with the ship unharmed through great distances and during long periods, yet when the lender can enforce and realize this lien he should do so. Voluntarily to permit the ship to voyage about the world with this unrecorded and secret lien on her, exposes innocent purchasers to great danger. It is, therefore, either a fraud on the part of the lender, or a carelessness which has the effect and does the work of fraud. It is, therefore, held, that the bond does not create any absolute interest in the ship, nor give an indissoluble lien; and if the lender delays enforcing it for an unreasonable time and without reasonable cause, and a third person, by purchase or levy, acquires the vessel without knowledge of the lien, the lender will be held to have waived and lost his lien; otherwise, not.[2]

If a bottomry suit has been commenced and then abandoned, Lord *Stowell* has expressed himself as very reluctant to sustain another suit on the same bond.[3] This reluctance would probably be felt by our admiralty courts; but would certainly be removed by any evidence explaining satisfactorily the abandonment of the former suit.

L. *Of the Power of the Master over the Cargo.*

In regard to the cargo, the master stands in a somewhat different relation from that which he holds toward the ship. In general he is bound to receive the cargo, stow it properly, care for

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allow the original interest if they have diminished it, or to still further diminish it, but in such cases it will act with great caution and take into consideration the peculiar circumstances of the case. The Zodiac, *supra*; The Cognac, *supra*.

[1] Greely *v.* Smith, 3 Woodb. & M. 236. See also, 3 Kent, Comm. 357.

[2] Blaine *v.* The Ship Charles Carter, 4 Cranch, 328; Wilmer *v.* The Smilax, 2 Pet. Adm. 295, note; The Rebecca, 5 Rob. Adm. 102. See also, The Sydney Cove, 2 Dods. 1, 7; Leland *v.* The Ship Medora, 2 Woodb. & M. 92, 105; The Brig Draco, 2 Sumner, 157, 191; The Brig Nestor, 1 Sumner, 73, 85; The Barque Chusan, 2 Story, 455, 468. See also, cases ante, p. 118, note 3; p. 406, note 4.

[3] The Fortitudo, 2 Dods. 58. In The Kalamazoo, 9 Eng. L. & Eq. 557, a ship was arrested in a cause of collision and the damage pronounced for. Subsequently, it being ascertained that the damage to the cargo was to a greater extent, a new action was commenced, and the ship again arrested. Held, that this new action could not be maintained.

it done, carry it directly, and deliver it safely; and sometimes fulfils all his duties and all his powers. He may, indeed, very rarely, be consignee or supercargo. Then he unites, but does not confuse, these several offices. Generally, on the voyage, he will be regarded in respect to the cargo, as only master of the ship. But when the ship and cargo have reached their destination, and he then begins to deal with the cargo, the character of master drops, and that of supercargo or consignee begins. But still these functions may be in some degree cotemporaneous, if not mingled. Thus, if at the port of destination, he takes the goods on shore, in doing this he is a master, and when he disposes of them on shore, he is consignee.[1] But if he takes them on shore with the intent of there embezzling them, although the wrongful act begins when he is consignee, the wrongful intent in what he does as master, makes it a barratrous act, or an offence as master.[2] So, if he makes a contract with a shipper which should give him a lien on the ship, it can only be when he makes it in his capacity of master.[3] And if the necessity for the bond

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[1] See United Ins. Co. *v.* Scott, 1 Johns. 106. If the master cannot sell the cargo he may leave it with a commission merchant in good credit, and is not obliged to bring it home. Day *v.* Noble, 2 Pick. 615; Lawler *v.* Keaquick, 1 Johns. Cas. 174; Stone *v.* Waitt, 31 Maine, 409. It is the custom in many places for goods to be consigned to the master for sale and returns. It has been held that while engaged in the transportation of the goods he is a common carrier, while employed in selling, a factor, and while bringing back the proceeds, a carrier again. That the master is a factor while selling is held in Stone *v.* Waitt, 31 Maine, 409; The Waldo, Davcis, 161. In Moseley *v.* Lord, 2 Conn. 389, however, it was held that the owner of the vessel was liable for the acts of the master in selling, on the ground that a consignment to the master was a consignment to him in his official capacity, and was the same as a consignment to the owners of the vessel, though it was admitted that if the consignment had been to the master by name, the result would have been different. In Emery *v.* Hersey, 4 Greenl. 407, Kemp *v.* Coughtry, 11 Johns. 107, and Harrington *v.* M'Shane, 2 Watts, 443, it was held that where the freight for the carriage of the goods was the only compensation paid, the owners of the vessel were liable as common carriers for the proceeds of the sale as well as for the safe transportation of the goods. But in a subsequent case in New York, it was held that where the master receives a commission for selling the goods aside from the freight, he is to be considered as the agent of the shipper as to the sale, and the owner of the ship is only responsible for the safe transportation of the goods. Williams *v.* Nichols, 13 Wend. 58.

The power of the master to sell, when goods are consigned to him for that purpose, is not revoked by the owner selling them while the vessel is at sea, the master having no knowledge of the sale; and he is considered as the agent of the vendee until some one else is appointed to act for him. Smith *v.* Davenport, 34 Maine, 520.

[2] Cook *v.* Com. Ins. Co., 11 Johns. 40.

[3] See ante, p. 124, n. 1; p. 135, n. 2.

arises from his acting contrary to the orders of his owners, he has no power to hypothecate the vessel.[1]

Generally, and in the exercise of his duties as master, he is a stranger to the cargo between the lading and the unlading. But exigencies and emergencies may arise, in which the master becomes, of necessity, supercargo or consignee, or to speak more correctly, is clothed with whatever agency or authority may be needed to enable him to protect the property and interests intrusted to him.[2] In case of capture the master should do all in his power to procure the restoration of the cargo,[3] but he is not bound to act fraudulently.[4] The question has arisen in the case of the seizure of the vessel and cargo for breach of a blockade, how far the act of the master in attempting to enter is to be considered as the act of the owner of the cargo. The general rule which has been laid down is, that if the vessel sails with a full knowledge that the port of destination is blockaded, there is a presumption that this is done with the full knowledge of the owner of the cargo, and he is not allowed to prove the contrary; but if the blockade is proclaimed subsequently to the sailing of the vessel, the shipper is not bound by the act of the master in seeking to enter after being warned off.[5]

He may sell the whole cargo, if he can neither take it on nor transship it, and it is perishable, and will be destroyed or importantly diminished in value, before he can obtain instructions from the owner.[6] So, too, he may sell a part of the cargo,

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[1] The Reliance, 3 Hagg. Adm. 66; The Mary Ann, 4 Notes of Cases, 376, 381, 10 Jurist, 253.

[2] The Gratitudine, 3 Rob. Adm. 240, 257; Vlierboom *v.* Chapman, 13 M. & W. 230, 239; Douglas *v.* Moody, 9 Mass. 548; Gillett *v.* Ellis, 11 Ill. 579.

[3] It is sufficient if what he does is done in good faith, and he is only answerable for fraud or intentional neglect. Cheviot *v.* Brooks, 1 Johns. 364.

[4] Hannay *v.* Eve, 3 Cranch, 242.

[5] The Adonis, 5 Rob. Adm. 256; The Brig Nayade, 1 Newb. Adm. 366.

[6] But if the voyage is broken up, he cannot sell the cargo at the intermediate port to pay for advances to him to repair the vessel for a new voyage, or to pay seamen's wages. Watt *v.* Potter, 2 Mason, 77. A sale without necessity is invalid, and conveys no rights to the purchaser. Freeman *v.* East India Co., 5 B. & Ald. 617; Morris *v.* Robinson, 3 B. & C. 196; Cannan *v.* Meaburn, 1 Bing. 243; Van Omeron *v.* Dowick, 2 Camp. 42; Wilson *v.* Millar, 2 Stark. 1; Ewbank *v.* Nutting, 7 C. B. 797; Campbell *v.* Thompson, 1 Stark. 490; Arthur *v.* Schooner Cassius, 2 Story, 81; Pope *v.* Nickerson, 3 Story, 465, 504; Dodge *v.* Union Ins. Co., 17 Mass. 471, 478. See also, the important case of Post *v.* Jones, 19 How. 150. In Peters *v.* Ballistier, 3

in order to raise funds to pursue the voyage and carry on the remainder. But not until other means of raising money are exhausted, including the drawing of bills on the owner, hypothecating the ship, or making other use of the owner's property or credit. In regard to the exercise of this power, it can only be said that there must be an actual and urgent necessity; and as to the manner of its exercise, much must be left to the discretion of the master. If he acts in good faith, and under a sufficient necessity, for the best interests of all concerned, and with reasonable discretion, his acts will be valid. But it is not enough that he acts *bonâ fide* if no actual necessity existed.[1] And although the beneficial effect of the sale will extend to the ship, by enabling her to earn her freight, and even if the ship profit most by it, yet if a part of the purpose and effect be to carry on the cargo that is not sold, it will be justified as an act for the common benefit.

M. *Of a Respondentia Bond.*

As the master may make a bottomry of the ship, so, either a part, or the whole of the cargo may be hypothecated by him, if necessary;[2] but only a part can be sold to raise funds; for if the whole is sold to raise money to repair the ship, this is no benefit to the cargo or to the shipper.[3]

Pick. 495, a case where the same person owned both ship and cargo, it was held that the master had no authority to sell the cargo for the purpose of paying a debt of the owner, although the creditor threatened, in case of refusal to detain the vessel and cargo by legal process. We have seen, ante, p. 161, n. 2, when it is the duty of the master to transship, and also, p. 161, n. 3, that he is not obliged to do so if the goods are perishable in their nature.

[1] The Gratitudine, 3 Rob. Adm. 240, 263; Pope *v.* Nickerson, 3 Story, 465, 491; The Packet, 3 Mason, 255; The Joshua Barker, Abbott, Adm. 215; Myers *v.* Baymore, 10 Barr, 114; Stillman *v.* Hurd, 10 Texas, 109; United Ins. Co. *v.* Scott, 1 Johns. 106; Fontaine *v.* Col. Ins. Co., 9 Johns. 29; Searle *v.* Scovell, 4 Johns. Ch. 218, 224; Am. Ins. Co. *v.* Coster, 3 Paige, 323; Ross *v.* Ship Active, 2 Wash. C. C. 226; Underwood *v.* Robertson, 4 Camp. 138. If the cargo belongs to the owner of the ship, the master may sell it at once for the benefit of the ship. Ross *v.* Ship Active, *supra*.

[2] See cases in note *supra*, also The Lord Cochrane, 1 W. Rob. 312, 2 id. 320; The Osmanli, 3 W. Rob. 198, 214; Justin *v.* Ballam, 1 Salk. 34.

[3] See cases in note 1, *supra*.

If the goods are hypothecated by the master abroad, this is usually done by a respondentia bond. This instrument, although sometimes in the form of a bill of sale, is usually in the form of a bond, and is almost the same thing in respect to the goods which a bottomry bond is to the ship.[1] And like that it may be made by the owner of the goods at home, without any necessity, either before or during a voyage; and it may be so made to take up a former bond; and it is not necessary that the money so raised by respondentia on the goods should be expended in the purchase of them or in any way about them.[2] If made by the master, it can only be made from necessity, and undoubtedly all the law and the rules in reference to this necessity would be the same as in a case of bottomry.[3] A loan on respondentia is a loan on maritime interest; it must therefore be a loan which is secured by the goods on their safe arrival, but which puts both the principal and interest at risk, and gives the lender no claim for any payment whatever if the goods be lost.[4] In practice the goods are also transferred to the obligee by an indorsement and delivery of the bills of lading, as collateral security; and this gives to the obligee a constructive possession of the goods.[5]

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[1] The Gratitudine, 3 Rob. Adm. 240, 260; The Osmanli, 3 W. Rob. 198, 214; The Nostra Senora del Carmine, 29 Eng. L. & Eq. 572. The master has no authority to give a bond on the cargo alone. If he does, the ship and freight are first liable, and then the cargo, because it is the same as if he had given a bond on the ship, freight, and cargo. La Constancia, 4 Notes of Cases, 285. And where a bond was given on the ship and cargo, it was held that the freight was also liable. The Prince Regent, cited 2 W. Rob. 83.

[2] Conard *v.* Atlantic Ins. Co., 1 Pet. 386; Franklin Ins. Co. *v.* Lord, 4 Mason, 248.

[3] See ante, cases on bottomry bonds. In many instances the owners of the cargo are the only parties who oppose the bond. See The Bonaparte, 3 W. Rob. 298, 1 Eng. L. & Eq. 641.

[4] In Franklin Ins. Co. *v.* Lord, 4 Mason, 248, the bond was given on the cargo to secure the sum of ten thousand dollars loaned upon the outward and the homeward cargoes of the vessel from Boston to Copenhagen and back. The vessel and cargo were totally lost upon the homeward passage. There was a clause in the bond that upon both voyages the vessel was to have on board the amount lent in goods. At the time of the loss she had only goods to the amount of nine thousand dollars on board. The lenders claimed to recover the whole amount on the ground that the having goods to the value specified was a condition precedent. But it was held that they could recover only the difference between the amount lent and the amount on board.

[5] In Johnson *v.* Greaves, 2 Taunt. 344, the master of a ship detained as a prize, and libelled in the prize court at Jamaica, gave bills of lading of the cargo, to a person

A bond of bottomry upon "the ship and freight" was held to bind them only, and to exclude the cargo, although in the recital of the same bond, it was said that the master was compelled to take up money "on the said schooner, her cargo and freight."[1]

If a portion of the cargo be pledged by respondentia, it has a right of contribution for the purpose of redemption against the rest of the cargo; and it is said that the court would be inclined to enforce this right against the other shippers, and not turn the party over to his remedy against the owner alone. But this must depend on circumstances. It might be a case in the nature of general average, and then all the interests benefited should contribute. But if, as would generally be the case, the ship was bound to carry the goods, and thereby earn her freight, and a part of the cargo was pledged for money to enable her to do this, the ship would be responsible in the first place, and the rest of the cargo would contribute only in case the ship could not be made to pay. For whatever other shippers contributed, they, too, could recover from the ship.[2]

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who became bail for the ship and cargo there. The court held that the master had no authority to contract that the cargo should be sold in London, and the proceeds remitted back to Jamaica, the owners being ready to give a sufficient security to indemnify the bail in London. Blackstone, in his Commentaries, vol. 2, p. 458, says that when money is lent upon the cargo only the borrower is liable, and the lender has no claim against the goods. And the very obscure case of Busk *v.* Fearon, 4 East, 319, may seem to confirm this remark. But it is absurd to say that money is lent upon a cargo, if it gives no lien on the cargo; and the whole law of respondentia would be defeated by such a rule. At most it can go no further than that a contract gives no lien on the cargo when it is plain that the cargo is to be sold, free from all lien, and the return cargo, which had no existence when the bond was made, cannot be subjected to the lien.

[1] The Schooner Zephyr, 3 Mason, 341.

[2] See ante, p. 302, n. 3; p. 303, n. 1; also Alers *v.* Tobin, before Lord *Ellenborough*, Abbott on Shipping, 372; Duncan *v.* Benson, 1 Exch. 537, 3 Exch. 644; Pope *v.* Nickerson, 3 Story, 465. In Hallett *v.* Wigram, 9 C. B. 580, an action of assumpsit was brought by a shipper against the owner of the ship to recover damages for the sale of a portion of a quantity of copper ore, shipped on a voyage from Adelaide in Australia to Swansea in South Wales. After having sailed, the vessel met with a storm, and was obliged to put back to Adelaide for repairs. To pay for these repairs a portion of the cargo was sold. The plea stated that the vessel met with a storm, and was obliged to put back, that repairs were necessary to enable her to deliver her cargo, and that no other ship could be obtained to take on the cargo, and that the master was unable by bottomry, hypothecation, or otherwise, than by such sale to raise the money necessary for the repairs, and that the ship when repaired was not

N. *Some Special Rules in regard to Bottomry Bonds.*

In payment of a bottomry bond where all the interests are bound, the assets are to be marshalled. In the first place the property of the owner of the ship will be applied. Then, the money of the master, or perhaps his other property, before the goods of shippers.[1] In making up the decree, the sum lent, together with the marine interest up to the time when the bond is payable, constitutes the principal, and legal interest is to be added to this from that time to the time of the decree.[2]

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worth the cost of repair. To this plea the plaintiff demurred, and the demurrer was sustained. The court held that the injury which obliged the vessel to put back not being itself a subject of general average, the expenses consequent thereon could not be compensated for by all the parties in interest, but must fall upon the ship-owner. In answer to the argument that the repairs were solely for the benefit of the cargo, because when put on the ship they cost more than the ship was worth, it was said by the court that the plea merely stated that the expense was greater than the value of the ship, and not, than the value of the ship and freight. They also held that the ore was a species of property which would not deteriorate by being kept, even if no other ship could be obtained at that time, but this, they said, did not appear by the plea, for the cargo consisted of other goods than the plaintiff's, and the plea merely stated that no other ship could be obtained to carry on the *cargo*, and not that none could be found to take the *plaintiff's goods*. There are also similar decisions in this country. Hassam *v.* St. Louis Perpet. Ins. Co., 7 La. Ann. 11; The Gold Hunter, 1 Blatchf. & H. Adm. 300; The Boston, id. 309, 330; Am. Ins. Co. *v.* Coster, 3 Paige, 323. But the shipper, whose goods are sold, is not entitled to claim from the ship-owner, the price which they might have realized at the port of delivery, unless the ship arrives. An averment of the arrival of the ship is therefore necessary. Atkinson *v.* Stephens, 7 Exch. 567, 14 Eng. L. & Eq. 407.

[1] The Ship Packet, 3 Mason, 255, 267. Both ship and freight are liable before the cargo, and this is true, although the bond is given on the cargo alone. The Constancia, 4 Notes of Cases, 285. For the way the court will marshal the assets where there are several bonds, one on ship and freight, and another on ship, freight, and cargo, see The Trident, 1 W. Rob. 29, ante, p. 430, n. 3.

[2] The Ship Packet, 3 Mason, 255, 267; Furniss *v.* The Brig Magoun, Olcott, Adm. 55, 66; The Ship Panama, id. 342, 352. In England, it would seem that the practice is to allow interest only on the bond, and not on the bond and interest. Marshall on Ins. b. 2, ch. 4, p. 752. Mr. Arnould, however, is of opinion that the law as laid down by Mr. Justice *Story* in the case above, is now the law of England. 2 Arnould, Ins. 1340. No authority is cited for this, and the practice seems to be the other way. See The Cognac, 2 Hagg. Adm. 377, 393; The St. Catharine, 3 Hagg. Adm. 250. After judgment, interest is not allowed unless the losing party occasion unnecessary delay. The Exeter, 1 Rob. Adm. 173. In The New Brunswick, 1 W. Rob. 28, it was held that where the legal holders of a bond reside out of the country, and have no agent there, interest will be decreed only from the time of the arrival of a power of attorney authorizing the receipt of the principal.

Although the last bottomry has a preference over all former ones, yet if the property will not pay all, and they are really concurrent, the parties being equally interested and on equal terms, they will be paid *pro rata*, although the different bonds may bear different actual dates.[1]

A bottomry bond in admiralty is generally regarded as a negotiable instrument or interest, which being transferred in good faith and for consideration, may be put in force by the holder in his own name.[2]

By the English statute of 7 Geo. 1, ch. 21, § 2, contracts made by English subjects upon loans by way of bottomry on ships in the service of foreigners, designed to trade within the limits of the East India's Company's charter, were made void. And by 19 Geo. 2, ch. 37, § 5, loans on bottomry upon ships belonging to English subjects, bound to or from the East Indies, were required to be made only on the ship and cargo, and to be so expressed in the bond.

In England courts of equity, as well as courts of admiralty, exercise jurisdiction over bottomry bonds.[3]

It may be added, that if a bond is obtained from the master by duress, it is of course void; but the fact that he was under duress at the time it was executed, does not prove that the bond was obtained by duress.[4]

If the bond contains such clauses as are proper to mortgages; as that the master "grants, bargains, and sells the ship, with the usual proviso, that on payment of the money it is to be void," this does not prevent it from being a bottomry bond, if the maritime risk is incurred.[5]

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[1] The Exeter, 1 Rob. Adm. 173, 176; La Constancia, 4 Notes of Cases, 512, 518.

[2] The Rebecca, 5 Rob. Adm. 102, 104; The Prince of Saxe Cobourg, 3 Hagg. Adm. 387, s. c. Soares *v.* Rahn, 3 Moore, P. C. 1; The Osmanli, 3 W. Rob. 198. The Code de Commerce, art. 313, 314, provides that a bond payable to order may be negotiated like any other commercial instrument, but the guaranty of payment by indorsement does not extend to the maritime interest, unless it is expressly so stipulated.

[3] Glascott *v.* Lang, 8 Sim. 358, 3 Mylne & C. 451; Dobson *v.* Lyall, 3 Mylne & C. 453, note; Duncan *v.* M'Calmont, 3 Beav. 409.

[4] The Heart of Oak, 1 W. Rob. 204; The Gauntlet, 3 W. Rob. 82.

[5] Robertson *v.* United Ins. Co., 2 Johns. Cas. 250.

CHAPTER XII.

OF THE SEAMEN.

SECTION I.

HOW SEAMEN ARE REGARDED BY THE COURTS.

The common law courts in some degree, and admiralty courts still more, regard these persons as peculiarly in need of, and entitled to, the protection of the courts, because peculiarly exposed to the wiles of sharpers and unable to take care of themselves.[1] The statutes of England and of this country contain many provisions in their behalf, and in some respects we carry them further than any other nation. Early in our legislation there was a prohibition against the shipping on board of our vessels of foreign seamen not naturalized.[2] But this act was made to apply only to the subjects and citizens of countries which pro-

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[1] Mr. Justice *Story*, in Harden *v.* Gordon, 2 Mason, 541, 555, states the law with great accuracy: "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying, and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar protecting favor and guardianship. They are emphatically the wards of the admiralty; and, although not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trust* with their trustees. The most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is, that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable."

[2] Act of March 3, 1813, ch. 42, 2 U. S. Stats. at Large, 809. See Appendix.

hibit the employment in their vessels of our citizens.[1] And as these are very few, this circumstance and the necessities of commerce have caused this statute to be very seldom regarded or enforced.

The most important points in which the statutes of the United States provide for the protection of our sailors are in relation to, 1st. The shipping articles; 2d. Wages; 3d. Provisions and subsistence; 4th. Sea-worthiness of the ship; 5th. The care of seamen in sickness; 6th. The bringing them home; 7th. Regulation of punishment; to which we may add, 8th. Provisions in respect to desertion and discharge, either at the beginning or during the course of the voyage. The principal statutes on these subjects we shall give in our Appendix. Here we shall state generally the purport and effect of these provisions and of the adjudications respecting them.

SECTION II.

OF THE SHIPPING ARTICLES.

Every master of a vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State, is required to have shipping articles, under a penalty of twenty dollars for every person who does not sign,[2] which must be signed by every seaman on board, and these must describe accurately the voyage, and the terms for which the seaman ships.[3] The courts interfere

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[1] Sect. 10. See Appendix.

[2] One suit should be brought for each penalty, and one count is sufficient. Wolverton *v.* Lacey, U. S. D. C., Ohio, 18 Law Reporter, 672.

[3] Act of July 20, 1790, c. 29, 1 U. S. Stats. at Large, 131. A general coasting and trading voyage in which the vessel is trading at different ports is within this act. The Crusader, Ware, 437. And it extends also to the lakes and public navigable waters connecting the same. Wolverton *v.* Lacey, U. S. D. C., Ohio, 18 Law Reporter, 672. The 6th section of the above act provides, that the master shall produce the contract and log-book when required, otherwise parol evidence of their contents may be given. The first section of the Act of 1840, 5 U. S. Stats. at Large, 394, has been considered to imply that the owner must deposit the original articles with the collector of the port

to protect a seaman against loose and indefinite language, or unfair, or new and unusual stipulations;[1] and wherever there is a doubt as to their meaning or obligation, the seaman has the benefit of the doubt.[2] Thus a voyage from one place to another being stated, and the words "and elsewhere" being added, these mean nothing, or only such further procedure by the vessel as fairly belongs to the voyage described; and this the law would permit without them.[3] But a definite usage may give a

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where they contract, and it has been suggested that this so far modifies the former act, that the master or owner, if not relieved from producing them at the call of the seaman, because, being in the custom-house, they are as much at the command of the seaman as of the owner, yet at least the seaman should give distinct and reasonable notice that he desires them. The Brig Osceola, Olcott, Adm. 450, 459. This case also decides that in the absence of the shipping articles the statement of the mariner in the libel is only evidence of what the master is obliged to put in the articles, namely, "a declaration of the voyage or voyages, term or terms of time for which the seaman or mariner shall be shipped." And also, that if the owners prove a reasonable excuse for not producing the articles, they may contradict by parol the statement of their contents by the mariner. See Piehl *v.* Balchen, Olcott, Adm. 24. The shipping articles are admissible as evidence of the terms of hire in an action brought by the master, or his administrator against the owners, as well as in suits between the seamen and owners. Willard *v.* Dorr, 3 Mason, 161.

[1] The leading cases on this point are The Juliana, 2 Dods. 504; Harden *v.* Gordon, 2 Mason, 541; Brown *v.* Lull, 2 Sumner, 443. If the articles are signed under duress and protest, they are invalid. Stratton *v.* Babbage, U. S. D. C., Mass., 18 Law Reporter, 94.

[2] See The Minerva, 1 Hagg. Adm. 347, 355; The Hoghton, 3 Hagg. Adm. 100, 112; Jansen *v.* The Heinrich, Crabbe, 226; Wape *v.* Hemenway, 18 Law Reporter, 390.

[3] Brown *v.* Jones, 2 Gallis. 477. In an early case before Mr. Justice *Winchester*, Anonymous, 1 Hall, Am. Law Journal, 209, the shipping articles were for a voyage from Baltimore to Curacoa, and *elsewhere*. It was held, that this did not authorize a voyage from Baltimore to St. Domingo, and that the words "and elsewhere" must be construed either as void for uncertainty, since they did not contain any proper description of the terminus *a quo* and *ad quem*, as required by the act of congress, or as subordinate to the principal voyage stated, and authorizing the ship in the progress of the voyage to pursue such course as might be necessary to accomplish the principal voyage, and this would be no more than was implied by the law itself. And in Ely *v.* Peck, 7 Conn. 239, a description of a voyage from New London to Oporto and elsewhere, was held to mean a voyage from New London to Oporto; and the words "and elsewhere" were rejected for uncertainty. See also, Gifford *v.* Kollock, U. S. D. C., Mass., 19 Law Reporter, 21; The Countess of Harcourt, 1 Hagg. Adm. 248; The Eliza, id. 182, 185; The Minerva, id. 347, 354; The George Home, id. 370, 374. In this last case it was decided that under an engagement to go "from London to Batavia in the East India seas, or elsewhere, and until the final arrival at any port or ports in Europe," the seamen were not bound, upon the arrival of the vessel at Cowes for orders, according to previous agreement between the owners and the master, to proceed on a further voyage

precise meaning to these words.[1] And the shipping articles ought to declare explicitly the ports of the beginning and of the

to Rotterdam. See also, The Westmorland, 1 W. Rob. 216, 225; Piehl *v.* Balchen, Olcott, Adm. 24. In Douglass *v.* Eyre, Gilpin, 147, it was held, that the description of a voyage from Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia, authorized a voyage from Gibraltar to South America, direct. Mr. Justice *Hopkinson* was also of the opinion, in the case of Magee *v.* The Moss, Gilpin, 219, that a voyage from Philadelphia to Buenos Ayres, thence to Havana, thence to Marseilles, thence to a port in South America, and thence back to Philadelphia, came within the description of a voyage "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia." This proceeds upon the ground that although the description be too broad to satisfy the act of congress, yet if the master does under it only what the court thinks reasonable, the seaman cannot leave the ship. This construction is opposed by Mr. Justice *Ware*, in the case of The Crusader, Ware, 437.

And it is now provided, by the Act of July 20, 1840, ch. 48, 5 U. S. Stats. at Large, 395, § 10, that all shipments of seamen contrary to the provisions of acts of congress shall be void. Accordingly it has been held, in a recent case, that a description of a voyage "from the port of Boston to Valparaiso, and other ports in the Pacific Ocean, at and from thence home, direct, or via ports in the East Indies or Europe," was not a compliance with the Act of 1790. Snow *v.* Wope, 2 Curtis, C. C. 301. Mr. Justice *Curtis* said: "It is manifest that no definite and specific voyage, nor even any limited number of voyages, is here described; but liberty exists, to carry on any number of voyages, during such time as the vessel may last, at the discretion of the master, provided that the first port to which the vessel goes is Valparaiso, and her ultimate port of destination is Boston. These are the only fixed termini, and between them there are no limits of time, and scarcely any of space. If this is a sufficient description to satisfy the requirement of the act, it is an idle requirement, and affords no protection to the seaman." See the same case in the District Court, 18 Law Reporter, 390. As to the meaning of the word "cruise" in the shipping articles, see The Brutus, 2 Gallis. 526. A trading voyage does not include a freighting voyage. Brown *v.* Jones, 2 Gallis. 477. Nor does a whaling voyage include a trading voyage to dispose of the cargo after it is obtained. Gifford *v.* Kollock, 19 Law Reporter, 21. In The United States *v.* Staly, 1 Woodb. & M. 338, a voyage from the home port to Apalachicola, or elsewhere for a market, was held to be sufficiently described in the shipping articles to be binding. In Stratton *v.* Babbage, U. S. D. C., Mass., 18 Law Reporter, 94, the question arose as to the meaning of "a port of discharge in the United States." It was held, that a port in the slave States, where colored seamen are obliged to remain in jail, or on board the vessel while she remains in port, is not a port of discharge for them. In The Varuna, Vice Adm. Ct., Lower Canada, 18 Law Reporter, 437, the voyage was "from the port of Liverpool to Constantinople, thence (if required) to any ports or places in the Mediterranean or Black seas, *or wherever freight may offer*, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or

[1] Thus the same objection does not apply to the use of the word "elsewhere" in a whaling, as in a trading or freighting voyage. But even in such a case, there must be a terminus to the voyage specified. Gifford *v.* Kollock, 19 Law Reporter, 21. See also, Brown *v.* Jones, 2 Gallis. 477.

termination of the voyage.[1] If a number of ports are named, they must be visited in their geographical, or rather commercial order, or as they stand in the articles, without returning to any which have been visited.[2] But if the shipping articles contain expressions not obviously oppressive, indicating distinctly that the master is to have a discretion in these matters, the courts will not interfere.[3]

So as to other stipulations, they will be sustained or rejected, as they seem to be fair or otherwise.[4] Any stipulation contra-

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for a term not to exceed twelve months." The ship went to Constantinople, and then returned to Malta, and thence sailed direct to Quebec in search of freight. The court held, that the voyage to Quebec was not justified by the articles, because the words "wherever freight may offer" should be construed with reference to the previous description of the voyage, and must be considered as meaning any ports or places in the two seas mentioned in the articles, or some place in their immediate neighborhood, or between them and the United Kingdom. And in Peterson *v.* Gibson, Superior Ct., Suffolk Co., Mass., 20 Law Reporter, 380, the description "a voyage from Liverpool to Havana, thence (if required) to any ports or places in the West Indies, or wherever freight may offer, and back to a final port of discharge in the United Kingdom, or for a term not exceeding twelve months," was held not to cover a voyage from the West Indies to Boston and back during the period. The following has been held to be a sufficient description: "From Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States." Thompson *v.* Ship Oakland, U. S. D. C., Mass., 4 Law Reporter, 349. Where the voyage was described in the shipping articles to be to a "final port of discharge," it was held that the voyage was not ended until the cargo was wholly unladen, and that the owner might order the vessel from port to port till that was done. United States *v.* Barker, 5 Mason, 404.

[1] Anonymous, 1 Hall, Am. Law Journal, 209; The Crusader, Ware, 437; Magee *v.* The Moss, Gilpin, 219, 226; Gifford *v.* Kollock, 19 Law Reporter, 21.

[2] Donglass *v.* Eyre, Gilpin, 147; Brown *v.* Jones, 2 Gallis. 477, 480.

[3] Wood *v.* The Nimrod, Gilpin, 83. But see The Brookline, U. S. D. C., Mass., 8 Law Reporter, 70.

[4] The Minerva, 1 Hagg. Adm. 347, 355; Harden *v.* Gordon, 2 Mason, 541, 555; Brown *v.* Lull, 2 Sumner, 443; The Sarah Jane, 1 Blatchf. & H. Adm. 401, 406; The Brig Cadmus *v.* Matthews, 2 Paine, C. C. 229. In The Prince Frederick, 2 Hagg. Adm. 394, the articles contained a clause that if contraband goods should be found in the forecastle, the seamen living therein should forfeit their wages and £10 besides. Held, that the penalty of £10 could not be enforced at all in a court of admiralty, and that only those seamen forfeited their wages who were proved to be directly implicated in the offence. In Harden *v.* Gordon, 2 Mason, 541, 555, the following stipulation was set aside as grossly inequitable: "We further agree and bind ourselves to pay for all medicines and medical aid, further than the medicine chest affords." See also, Freeman *v.* Baker, 1 Blatchf. & H. Adm. 384. So a stipulation, that the seamen will sue for wages in courts of common law only, is void, unless it be proved that the matter was clearly explained to them, before they entered into the agreement; and their

vening the language or the policy of a statute, is of course void.[1] Not unfrequently clauses are introduced lessening the rights of the seamen to their wages, or the like; and though common law courts allow some force to these,[2] admiralty courts never do;[3] nor do they give any effect to the receipt of a sailor for his

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rights will be in no way prejudiced by such a change. The Sarah Jane, 1 Blatchf. & H. Adm. 401. It was also held, in this case, that under a stipulation that all *differences* between the master or owners and the crew, shall be referred to arbitration, where wages due were demanded, but payment refused, there was no *difference* within the meaning of the stipulation. In Brown *v.* Lull, *supra*, Mr. Justice *Story* said: "Courts of admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity. Whenever, therefore, any stipulation is found in the shipping articles, which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded on imposition or an undue advantage taken of their necessities and ignorance and improvidence, unless two things concur; first, that the nature and operation of the clause is fully and fairly explained to the seamen; and, secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby." In Neave *v.* Pratt, 5 B. & P. 408, the articles contained a clause that the seamen might leave the ship at the end of three months, if the ship was in port or in perfect safety, of which the captain was to be the sole judge. Held, that even if this proviso were not void, yet the captain could not refuse without reason, of which the jury were to judge. In Granon *v.* Hartshorne, 1 Blatchf. & H. Adm. 454, it was held, that a stipulation that the seamen should not sue for wages until the vessel was unladen, was binding if fairly made. And in The Atlantic, Abbott, Adm. 451, a stipulation in the articles for a whaling voyage, that if either of the officers or crew should be prevented by sickness or any other cause from performing their duty during the whole of the voyage, he should receive of his lay in proportion as the time served or duty performed by him should be to the whole time of the voyage, was held valid.

[1] Harden *v.* Gordon, 2 Mason, 541.

[2] Cutter *v.* Powell, 6 T. R. 320; Appleby *v.* Dods, 8 East, 300; Jesse *v.* Roy, 4 Tyrw. 626, 1 Cromp. M. & R. 316. In this case Lord *Lyndhurst*, C. B., said: "I know no principle by which a contract entered into by mariners is to be construed differently from those made among other persons." See also, Rice *v.* Haylet, 3 Car. & P. 534; Webb *v.* Duckingfield, 13 Johns. 390; Dunn *v.* Comstock, 2 E. D. Smith, 142, and cases in next note.

[3] In The Juliana, 2 Dods. 504, it was held, that in a divided voyage, where, by the general law, the seamen are entitled to their wages up to the last port of delivery, a stipulation in the articles, that they should not be entitled to any part of their wages in case of the loss of the vessel before her arrival at the final port of discharge, was void. See also, Buck *v.* Rawlinson, 1 Bro. P. C. 137; Edwards *v.* Child, 2 Vern. 727. So in Johnson *v.* Sims, 1 Pet. Adm. 215, where the agreement was as follows: "No officer or seaman belonging to the said ship shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the port of discharge in Philadelphia." This was held to mean merely that the wages for the outward voyage should be paid only in Philadelphia; and that if the vessel was lost or captured the wages due should

wages, whether sealed or parol, unless there was an actual payment of them;[1] and if the shipping articles be sealed by the mariners but not by the master, assumpsit lies on them by the seamen, at common law.[2] In admiralty, seals have no effect.[3] The stipulation in the shipping articles is conclusive as to wages;[4] and no more can be recovered on any special promise

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be paid after the ordinary time for her arrival had elapsed. See also, Millot *v.* Lovett, Sup. Jud. Ct., Mass., 2 Dane, Abr. 461; Swift *v.* Clark, 15 Mass. 173. In the case of Goodridge *v.* Peabody, before the same court, 2 Dane, Abr. 462, the special agreement was fully explained to the seaman before he signed, and the case was, therefore, decided differently from those above cited. In Brown *v.* Lull, 2 Sumner, 443, the following stipulation was held to be void: "In case of the said vessel being taken or lost in the course of the said voyage, no wages shall be demanded or received by the persons subscribing the same, except the advance wages received by them respectively, at the time of entry on board; and that, if the said vessel should be restrained for more than thirty days at any one time, the wages should cease during such restraint and no longer." So in The Cypress, 1 Blatchf. & H. Adm. 83, it was held, that a stipulation was void which provided that the seamen should not, in any case, demand their wages until the expiration of twelve months, if the voyage was completed, or the men discharged before that time. But a stipulation, that the seamen shall not sue for wages, until the vessel is unladen, is binding, if fairly made. Granon *v.* Hartshorne, 1 Blatchf. & H. Adm. 454. So a clause, usual in the Baltic trade, that the officers and seamen agree to accept half wages in case of the vessel wintering abroad, is valid. The Hoghton, 3 Hagg. Adm. 100.

[1] Thorne *v.* White, 1 Pet. Adm. 178; Jackson *v.* White, id. 179; Whiteman *v.* The Neptune, id. 180, 182; Harden *v.* Gordon, 2 Mason, 541; Thomas *v.* Lane, 2 Sumner, 1, 11; Piehl *v.* Balchen, Olcott, Adm. 24. And in Whitney *v.* Eager, Crabbe, 422, a release of all complaints against the officers of the vessel which the seaman had to sign in order to get his wages, was held to be void. But the evidence to control a receipt in full for wages must be clear and explicit. Leak *v.* Isaacson, Abbott, Adm. 41.

[2] This is in accordance with the head note in Sutherland *v.* Lishman, 3 Esp. 42, but it does not appear certainly what point the case decided. The action was assumpsit for wages. In defence it was shown that the ship's articles were under seal, that they were signed by the plaintiff but not by the defendant, and it was contended that, the articles being under seal, the action ought to have been covenant. The report then adds: "Lord Eldon ruled, that the binding by deed ought to be mutual to make it necessary for the plaintiff to sue in covenant, that the defendant never having sealed the articles could not be sued in that form of action, and that the present action was not rightly brought. The defendant had a verdict." To make this language consistent, either the word "not," in the phrase "*not* rightly brought," must be struck out, and the word "plaintiff" be substituted for "defendant" in the last sentence, or we must suppose that, owing to some facts not mentioned, assumpsit would not lie.

[3] The David Pratt, Ware, 495.

[4] White *v.* Wilson, 2 B. & P. 116; Elsworth *v.* Woolmore, 5 Esp. 84; The Isabella, 2 Rob. Adm. 241; Veacock *v.* M'Call, Gilpin, 329. But see Parker *v.* The Ship Calliope, 2 Pet. Adm. 272; Page *v.* Sheffield, 2 Curtis, C. C. 377. In Carter *v.* Hall, 2 Stark. 361, it was held, that a purser's steward, who receives a specific salary from the crown, cannot recover wages from the purser on an implied contract for his services

to pay for severe or extra labor or exposure in the course of duty.[1] If, however, a seaman be promoted, he takes the wages of his

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on board the ship. See also, Dafter *v.* Cresswell, 7 Dowl. & R. 650. But in Clutterbuck *v.* Coffin, 4 Scott, N. R. 509, it was held, that, the plaintiff having, at the request of the defendant, a captain in the navy, entered on board his ship as cook, on condition that he should be paid wages over and above the government pay, he might recover from the defendant. If a cook performs services out of the line of his employment, as where he acts as caulker, he may recover additional compensation. The Exchange, 1 Blatchf. & H. Adm. 366. And the same rule applies where the captain paints his ship himself. String *v.* Hill, Crabbe, 454. But the master is entitled to call on the cook to do seaman's work, when the vessel is in port. Allen *v.* Hallet, Abbott, Adm. 573. In the case of The Brookline, U. S. D. C., Mass., 8 Law Reporter, 70, the crew were shipped on a voyage "to a port or ports easterly of the Cape of Good Hope, or any other port or ports to which the master should see fit to go in order to procure a cargo." The owners intended to go to Ichaboe for a cargo of guano. This was concealed from the seamen. The seamen refused to work at loading the guano, and the master finally agreed to pay them a certain sum, over and above their wages, for every ton they should load. The court held, that the seamen were not bound to work for their ordinary wages; because fraud had been practised upon them to get them there, and that they might recover compensation in addition to the sum agreed upon at the island. If mariners are shipped during a war, but while on the voyage peace ensues, their wages are not diminished. M'Culloch *v.* The Lethe, Bee, Adm. 423; Shaw *v.* The Lethe, id. 424. But if the ship do not enter upon the high seas, the scene of danger, until after peace is declared, the wages will be decreased, after the time of such declaration. Brice *v.* The Nancy, Bee, Adm. 429.

[1] Harris *v.* Watson, Peake, Cas. 72. So, where some of the crew deserted and the captain could not obtain any men to fill their places, a promise by him to divide the wages of those who had deserted, among the crew remaining, was held to be void. Stilk *v.* Myrick, 2 Camp. 317; Harris *v.* Carter, 3 Ellis & B. 559, 25 Eng. L. & Eq. 220. And in a case where the master had distributed the wages of the deserters among the rest of the crew, it was held, that in an action by the crew for wages the owners could retain a sum equal to the amount so paid over. Dr. *Lushington*, however, said that he did not wish it to be inferred that seamen, when the outward voyage is completed, are bound to make the return voyage when the number of the crew is so small that risk of life may be incurred. The Araminta, 29 Eng. L. & Eq. 582. And if the vessel becomes so short-handed at an intermediate port as to be unseaworthy, a note voluntarily given by the captain to a seaman to secure an extra remuneration, in consideration of the seaman's assisting to carry on the ship, is valid. Hartley *v.* Ponsonby, Q. B. 20 Law Reporter, 389. In Thompson *v.* Havelock, 1 Camp. 527, the plaintiff, who was captain of a vessel, let her to the government for a fixed price, and also stipulated that he should be paid, in consideration of the extra services he would be obliged to perform, one shilling per ton per month. The government paid this over to the owner, and in an action against him by the captain, it was held, that the latter could not recover it. A promise of higher wages made to seamen threatening to desert, is void. Bartlett *v.* Wyman, 14 Johns. 260. See also, Johnson *v.* Dalton, 1 Cow. 543. In Frazer *v.* Hatton, 2 C. B. N. S. 512, 40 Eng. L. & Eq. 318, the plaintiff signed shipping articles, by which he agreed to serve as steward on a certain voyage at the rate of £3 per month. The articles also provided that "the crew, if required, might be transferred to any other ship in the same employ." It was held, under this provision, that

new office.[1] But it seems that if he be afterwards degraded for incapacity, he cannot recover his advanced wages during the period of his advancement, but only wages as a seaman.[2]

The power of the master, however, to degrade an officer[3] or a seaman, is limited and cannot be exercised for trivial offences.[4] And as the power to disrate is remedial only, and not penal, the

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any member of the crew might be transferred without the rest, and that articles signed by the captain stipulating for higher wages for the plaintiff, he having been transferred, were null and void. In Mesner *v.* The Suffolk Bank, 1 Law Reporter, 249, it was held, where a steamboat came into collision with a sailing vessel, and was in imminent danger of sinking, that a promise of a reward by a passenger to the officers or crew to secure their exertions in saving his property, was not binding.

But if the ship is captured, and the captain, to induce one of the crew to become a hostage, promises to pay him wages, at the same rate as before the capture, as long as he shall remain a hostage, such promise is binding on the owners. Yates *v.* Hall, 1 T. R. 73.

[1] The Providence, 1 Hagg. Adm. 391; The Gondolier, 3 Hagg. Adm. 190; Hicks *v.* Walker, Exch. 1856, 37 Eng. L. & Eq. 542. Where the mate succeeds to the command of the vessel, on the death of the captain, he becomes entitled to extra wages, but a question has arisen whether he can sue *in rem* for his services as master. In England it is settled that he cannot. Read *v.* Chapman, 2 Strange, 937; The Favourite, 2 Rob. Adm. 232. The case of The Brig George, 1 Sumner, 151, has been supposed to advance a contrary doctrine. The action was *in rem* by the mate to recover his wages. The claim was admitted, but the owners sought to set off a claim for money expended on account of his sickness, after he had become master. It does not appear that the increased wages due him as master were included in his demand, and the only point in controversy was as to the validity of the set-off. The English authorities have been followed by Mr. Justice *Betts* in the case of The Schooner Leonidas, Olcott, Adm. 12. See also, Airey *v.* The Brig Ann C. Pratt, 1 Curtis, C. C. 395, 398.

[2] Wood *v.* The Nimrod, Gilpin, 83.

[3] In the case of The Ship Mentor, 4 Mason, 84, 101, Mr. Justice *Story* said: "I must be permitted to say, that when a man ships in any particular capacity on board a ship, it is not for slight causes that he is to be degraded or compelled to perform other duty. He is not to be subject to the caprice, or distaste, or petulance of the master. He stipulates for fair and reasonable knowledge, and due diligence; but not for extraordinary talents. If he is guilty of fraud or misrepresentation he is doubtless subject to all just consequences. But when he acts *bonâ fide*, and is willing to perform his duty, if he should be more tardy in his movements than other men, it constitutes no just ground for degradation." See also, Atkyns *v.* Burrows, 1 Pet. Adm. 244, 247; The Exeter, 2 Rob. Adm. 261; Thompson *v.* Busch, 4 Wash. C. C. 338. But if an officer or seaman is incompetent he may be disrated. The Elizabeth Frith, 1 Blatchf. & H. Adm. 195, 210; The Exchange, id. 366; Morris *v.* Cornell, 6 Law Reporter, 304. And a steward may be disrated for embezzling the ship stores. Burton *v.* Salter, U. S. C. C., Mass., 21 Law Reporter, 148.

[4] Sherwood *v.* McIntosh, Ware, 109. It was held, in this case, that a steward could be degraded for acts of dishonesty or habits of intemperance, but not for a single act of intemperance.

master cannot degrade a person to the lowest station if there be an intermediate one which he is competent to fill.[1] But if an officer is promoted during the voyage by the captain, it seems that he may send him back to his former situation for a less offence than he could, if he had originally been shipped for the higher station.[2] Accidental omissions in the shipping articles may be supplied by parol; and if seamen sail without any shipping articles, they are then entitled to the highest rate of wages paid at the place at which they ship, within the preceding three months, for the same voyage.[3] All interlineations, erasures, or alterations, are presumed to be fraudulent, unless satisfactorily

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[1] Smith *v.* Jordan, U. S. C. C., Mass., 1857, 21 Law Reporter, 204. It was held, in this case, that a cooper could not be disrated, and ordered to do the duty of a foremast hand, but he should be first tried as cooper's mate.

[2] Wood *v.* The Nimrod, Gilpin, 83.

[3] Stat. 1790, ch. 29, § 1, 1 U. S. Stats. at Large, 131; Stat. 1840, ch. 48, § 10, 5 U. S. Stats. at Large, 394. The former of these acts has been held not to be applicable to a seaman on board a tug boat which ran from the mouth of the River Detroit to Port Huron. Milligan *v.* Propeller B. F. Bruce, 1 Newb. Adm. 539. In England if the articles are signed, and the rate of wages omitted, parol evidence of the rate agreed on is admissible. The Porcupine, 1 Hagg. Adm. 378; The Harvey, 2 Hagg. Adm. 79; The Prince George, 3 Hagg. Adm. 376. The same rule has been adopted in this country. Wickham *v.* Blight, Gilpin, 452; The Warrington, 1 Blatchf. & H. Adm. 335. It seems to have been supposed, by Mr. Justice *Betts*, that the highest rate of wages payable within the three months previous might be recovered in such a case. But the statute of 1790 applies only when the master neglects to insert in the contract the voyage and the length of time, and does not apply to the omission to insert the rate of wages. Under the statute of 1790, Mr. Justice *Peters*, in the case of Jameson *v.* The Ship Regulus, 1 Pet. Adm. 212, stated that he had been of the opinion that if there was a verbal agreement for wages, this superseded the law, and was to be taken as the contract. Mr. Justice *Story*, in a note to Abbott on Shipping, 607, said: "No case is referred to where such a decision had been made; and before it could be made, it would require very grave consideration, how far such a verbal agreement, in contravention of the statute, should be admitted to supersede the positive direction of the statute as to the highest wages." In The Crusader, Ware, 437, parol evidence was held inadmissible to prove that a lower rate of wages or a different mode of compensation was agreed on. The Act of 1840 has enlarged that of 1790 to some extent. The tenth section provides that "all shipments of seamen made contrary to the provisions of this and other acts of congress, shall be void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment." The Act of 1790, does not exempt the seaman from penalties and forfeitures incurred under the maritime laws prœxistent to that act. Jameson *v.* The Ship Regulus, 1 Pet. Adm. 212. If a seaman ship without signing the articles, an implied contract is presumed by which he is bound to remain with the ship till the voyage is terminated. Jansen *v.* The Heinrich, Crabbe, 226.

explained.[1] It may be added, that the usual rules of evidence and of construction apply to the shipping articles;[2] but a seaman may show by parol that written statements were made to induce him to sign,[3] as that the voyage or time of service represented was not that which is on the paper;[4] or that the articles have been altered since they were subscribed.[5] In the United

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[1] Stat. 1840, ch. 48, § 4, 5 U. S. Stats. at Large, 395. In the case of The Sch. Eagle, Olcott, Adm. 232, it was held, that this applied only to such alterations as would vary the effect of the shipping articles in regard to seamen, and not to immaterial erasures.

[2] But a court of admiralty will construe the articles liberally. Mr. Justice *Story*, in the case of The Brutus, 2 Gallis. 526, 537, said, speaking of shipping articles: "These, like all other mercantile instruments, are drawn up in a very lax and inartificial manner. To construe the language by the technical rules of literal interpretation would be to defeat the manifest intention of the parties. We are, therefore, bound to construe it with great liberality, and to look to the general scope and object of the instrument, rather than to weigh minutely the force of detached expressions."

[3] Baker *v.* Corey, 19 Pick. 496; The Enterprise, 2 Curtis, C. C. 317, 320.

[4] In The Cypress, 1 Blatchf. & H. Adm. 83, twelve months was the time of service mentioned in the articles. Held, that it could be shown by parol that nine was the time agreed upon. The question, in regard to the admissibility of parol evidence to change the voyage described in the shipping articles, was elaborately discussed in the late case of Page *v.* Sheffield, 2 Curtis, C. C. 377. The action was for wages alleged to be due on a voyage from San Francisco to Calcutta, and thence to Boston. The libellant was discharged against his will at Calcutta. In the articles the voyage was described to be from San Francisco to Calcutta. Evidence was offered to prove that the libellant shipped for the whole voyage from San Francisco to Boston. Mr. Justice *Curtis* held, that it was admissible on two grounds. First, that the voyages from San Francisco to Calcutta, and from the latter place to Boston, might be considered as distinct, and the articles for the first not being intended to include the second, the latter might be proved by parol. Second, if the contract was entire, then the articles did not describe the voyage, and the master was, therefore, prohibited from taking the libellant to sea under such articles, and parol evidence is always admissible to impeach a contract, by showing it to be made in violation of law. See also, the same case in the District Court, 18 Law Reporter, 99. But the ship-owner cannot vary the voyage by parol evidence. The Triton, 1 Blatchf. & H. Adm. 282; The Exchange, id. 366.

[5] See *supra*, note 1. The general rule in regard to parol evidence is stated in Willard *v.* Dorr, 3 Mason, 161, 169. Mr. Justice *Story* there said: "But *primâ facie* the shipping articles are presumed to import verity, and to be as well known to the owner as master; and it is incumbent on the owner, if he means to contest the fact, to offer some evidence of fraud, mistake, or interpolation." If there is a stipulation in writing for a series of voyages, this may be terminated or varied by the mutual consent of the master and crew, and a new voyage substituted by a parol agreement. Piehl *v.* Balchen, Olcott, Adm. 24. In The Trial, 1 Blatchf. & H. Adm. 94, it was held, that in a suit for wages if the owners do not produce the shipping articles, even though they are not called upon to do so, parol evidence of the terms of hiring may be given. But see The Brig Osceola, Olcott, Adm. 450.

States the shipping articles for a fishing voyage are required to be indorsed or countersigned by the owners, but the seaman is not restricted to those who sign, in an action for his wages, but may show *aliunde* who are the actual owners.[1] The master of a vessel has no power to bind the owner to pay a seaman three months' wages after the voyage has terminated and all services on his part have ceased, but if a seaman is hired in a foreign country the master may bind the owners to pay him such sum as will enable him to return.[2]

Wages, excepting as just above stated, and by limiting the right to demand wages in a foreign port to one third the amount then due, unless it be otherwise stipulated,[3] do not enter particularly into the provisions of our statutes. But seamen have a lien on the ship and freight for their wages, enforceable in admiralty, as we shall hereafter state. In general, as freight is the mother of wages, none are earned unless freight is earned, or might have been; but, to avoid repetition, we shall not consider this subject until we speak of wages in connection with admiralty jurisdiction.

SECTION III.

OF PROVISIONS.

Provisions, of due quality and quantity, are to be furnished by the owner under the general principles of law as applied to this particular contract.[4] The quantity for each person on board is, however, prescribed by statute, under penalty of a day's wages

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[1] Wait *v.* Gibbs, 4 Pick. 298. It would seem, however, that he could not bring an action on the shipping articles except against those whose names appeared on that instrument.

[2] Canizares *v.* The Santissima Trinidad, Bee, Adm. 353.

[3] Act of 1790, ch. 29, § 6, 1 U. S. Stats. at Large, 133. See also, cases ante, p. 446, note 3.

[4] This has been the custom among maritime nations from the earliest times. Pothier on Maritime Contracts, n. 215 (Cushing's ed.), 131; Consolato del Mare, ch. 100. See also, 1 Pardes. 335, 381, 483; 2 id. 510; The Madonna D'Idra, 1 Dods. 37; Dixon *v.* The Cyrus, 2 Pet. Adm. 407, 411.

extra, to every seaman, for the days on which he is on short allowance.[1] If, however, the necessity of short allowance springs from a peril of the sea, or any accident of the voyage, or the delivery of a part of the provisions to another vessel in distress, the extra wages are not given.[2]

It has been held that a deficiency in one kind of provisions is not compensated by an abundance in another; as a deficiency in bread by an excess of beef;[3] but it is clear that the master must have in every port a certain discretion in supplying wholesome and abundant food, of such kinds as can be most economically procured, if those specified in the act cannot be obtained by reasonable exertions.[4] The master must see to the expenditure of the provisions; he should guard against waste; and putting the crew on an allowance is by no means the same thing as putting them on short allowance.[5]

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[1] Act of 1790, ch. 29, § 9, 1 U. S. Stats. at Large, 131, 135. In Gardner *v.* The Ship New Jersey, 1 Pet. Adm. 223, the voyage was an entire one from Philadelphia to Canton, with liberty to go to other intermediate ports, and back to Philadelphia. It was contended that as some of the mariners shipped at foreign ports, they did not come within the statute. But the objection was overruled.

[2] Though we are not aware of any case where this point has been expressly decided, yet it follows as a necessary deduction from the fact that to enable the seaman to recover the extra wages, not only must he be put on short allowance, but it must be shown also that the vessel sailed without having on board the stores prescribed in the act. The Ship Elizabeth *v.* Rickers, 2 Paine, C. C. 291; Ferrara *v.* The Barque Talent, Crabbe, 216; The Bark Childe Harold, Olcott, Adm. 275. If the vessel sailed with the requisite quantity on board in good condition, but part was spoiled afterwards, so that the crew were put on short allowance, their remedy is by an action for the special damage done them, but they cannot claim extra wages. The Bark Childe Harold, Olcott, Adm. 275. If it is clearly proved that the crew were put upon short allowance, the burden is on the ship-owner to show that the vessel had the requisite provisions on board at the time of sailing. Piehl *v.* Balchen, Olcott, Adm. 24, 31. In The Bark Childe Harold, Olcott, Adm. 275, 279, it was contended that the same rule applied where the libellant showed that bread of a bad and unwholesome quality had been served out to them. But the court held, that the rule ought not to be extended to require the owner to give evidence of the quantity and quality of provisions stored on board, when the testimony of the libellants showed that there was an abundant supply in the ship and only accused it of being unwholesome in quality when shipped.

[3] Coleman *v.* Brig Harriet, Bee, Adm. 80. In this case the captain left port with only ninety pounds of bread per man instead of one hundred, but there was a great overplus of meat and water. It was held that the seamen should receive one third of the amount of wages contracted for over and above their common wages.

[4] Mariners *v.* The Ship Washington, 1 Pet. Adm. 219. But in such a case the articles substituted must be a full equivalent both in quantity and quality for those required by law. The Mary, Ware, 454.

[5] What is a proper allowance is to be determined by the navy ration. Mariners *v.*

SECTION IV.

OF THE SEA-WORTHINESS OF THE SHIP.

So, too, the owner would be bound to provide a sea-worthy ship;[1] and our statutes provide the means of lawfully ascertaining her condition, on the complaint of the mate and a majority of the seamen, by a regular survey, at home or abroad.[2]

Ship Washington, 1 Pet. Adm. 219; The Mary, Ware, 454, 460; Ship Elizabeth *v.* Rickers, 2 Paine, C. C. 291, 298. In this case Mr. Justice *Thompson* said: "To subject the master or owners to the extra wages, the crew must be *put* upon short allowance; by which I should understand that there must be some order or command to that effect given, or some gross negligence in the master. An accidental or unintentional deficiency in weight, would not subject the master or owner to the penalty."

If extra wages are claimed, the answer must set forth precisely whether the vessel shipped the quantity and quality of provisions, required by the statute. The Elizabeth Frith, 1 Blatchf. & H. Adm. 195. See Appendix for the navy ration.

[1] In Couch *v.* Steel, 3 Ellis & B. 402, 24 Eng. L. & Eq. 77, an action was brought by a seaman to recover damages for injuries sustained in consequence of the vessel leaving port in an unseaworthy condition. There was no allegation that the owners knew the vessel was unseaworthy. On demurrer the court held that the plaintiff could not recover, as there was no implied warranty on the part of the owners that the ship should be sea-worthy. This decision is clearly repugnant to the principles of the American authorities on this subject, independent of statute provisions. In the case of Dixon *v.* Ship Cyrus, 2 Pet. Adm. 407, 411, decided in 1789, it was held that both law and reason implied that at the commencement of the voyage the vessel should be sea-worthy. See also, Rice *v.* The Polly & Kitty, id. 420. In the case of The Ship Moslem, Olcott, Adm. 289, the vessel put into Cape Town in a leaky condition. The libellants shipped there for the home voyage to New York. The condition of the vessel was known to them, and they shipped with the express notice that their services would be required in pumping out the vessel on her voyage. Yet it was held that if the vessel was actually unseaworthy when she sailed, that is if she was unfit for the voyage, the libellants were not bound by their contract, and could rightfully refuse to continue their voyage, and compel the master to return to port. In Eaken *v.* Thom, 5 Esp. 6, it was held that where the ship sailed in an unseaworthy condition, and in consequence thereof the voyage was afterwards abandoned, no freight being earned, the seamen were not entitled to their wages. This case was doubted by *Kent*, C. J., in Hoyt *v.* Wildfire, 3 Johns. 518. As the voyage was lost by the default of the owner in sending the vessel to sea in such a condition, it seems clear that the wages should have been paid. See Hindman *v.* Shaw, 2 Pet. Adm. 264, 266.

[2] Act of July 20, 1790, ch. 56, § 3, 1 U. S. Stats. at Large, 132; Act of July 20, 1840, ch. 48, § 12, 13, 14, 5 U. S. Stats. at Large, 396. The former of these acts provides that if the mate or first officer under the captain, and a majority of the crew of

The third section of the statute of 1794, provides that the master shall pay the costs of the survey in the first instance, and if the complaint appears to have been without foundation, the costs and a reasonable sum for the detention shall be paid out of the wages of the crew. But it has been held that if there was reasonable cause for the survey, the owners could not charge the expense to the seamen.[1] Seamen, after shipping, often refuse to proceed on the voyage; and if then arrested for the mutiny, the condition of the vessel, if that be their excuse, is inquired into by the court; and if she is found to be unseaworthy, their punishment is reduced and mitigated accordingly.[2]

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any vessel bound on a voyage to a foreign port, shall, before the vessel has left the land, require the sea-worthiness of the vessel to be inquired into, the master shall stop at the nearest port for the purpose of having such inquiry made. On the construction of this act, *Ware*, J., remarked in the case of The William Harris, Ware, 367, 373, that the reason of the law applied as strongly to the case of a vessel departing from a foreign port on her return, as leaving her home port on a foreign voyage. This is now settled by the statute of 1840. By this act the consul, or commercial agent at the foreign port, is directed on complaint being made in writing by any officer and a majority of the crew, to appoint two persons to inspect the vessel, etc. By the Act of 1850, ch. 27, § 6, 9 U. S. Stats. at Large, 441, the Act of 1840 is so far amended, as to require the complaint to be signed, by the first, or the second and third officers, and a majority of the crew. If the crew, instead of availing themselves of their statute remedy, suffer the owner to repair the vessel of his own accord, and he employs an agent who pronounces her sea-worthy, they cannot refuse to proceed on the ground that the repairs are insufficient, if they are not so in fact. Porter *v.* Andrews, 9 Johns. 350.

[1] The William Harris, Ware, 367. The statute of 1840, provides that the expenses shall be deducted from the wages of the seamen, on the inspectors certifying that the complaint was made without good and sufficient cause.

[2] United States *v.* Nye, 2 Curtis, C. C. 225. Mr. Justice *Curtis* in this case said: "I think the correct rule is, that after the men have rendered themselves on board, pursuant to their contract, and before the voyage is begun, they may lawfully refuse to go to sea in the vessel, if they have reasonable cause to believe, and do believe the vessel to be unseaworthy. But the presumption is that the vessel was sea-worthy; and the seamen must prove that they acted in good faith, and upon reasonable grounds of belief that the ship was not in a fit condition to go to sea, by reason of unseaworthiness. If they prove this, they are justified in their refusal, and are not guilty of any offence." See also, United States *v.* Staly, 1 Woodb. &. M. 338; Dixon *v.* The Ship Cyrus, 2 Pet. Adm. 407. So unseaworthiness is a sufficient defence to the charge of endeavoring to commit a revolt by compelling the master to return to port. United States *v.* Ashton, 2 Sumner, 13. See also, The William Harris, Ware, 367.

SECTION V.

OF THE CARE OF SEAMEN IN SICKNESS.

Sickness is provided for by statute, so far as to require that every ship of the burden of one hundred and fifty tons, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, should have a proper medicine chest on board.[1] This act has been extended to vessels of seventy-five tons, navigated by six or more persons in the whole, bound from the United States to any port in the West Indies.[2] By other statutes the master may deduct twenty cents a month from every seaman's wages, to make up a fund for the support of marine hospitals, in which every sailor may have medical treatment.[3] There is, however, by the general law-merchant, an obligation upon every ship-owner or master to provide for a seaman who becomes sick, or wounded, or maimed in the discharge of his duty, whether at home or abroad, at sea or on land, — if it be not by his own fault, — suitable care, medicines, and medical treatment, including nursing, diet, and lodging.[4] At first it was held that the statute requiring a medi-

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[1] Act of 1790, ch. 29, § 8, 1 U. S. Stats. at Large, 134.

[2] Act of 1805, ch. 28, 2 U. S. Stats. at Large, 330.

[3] Act of 1798, ch. 77, 1 U. S. Stats. at Large, 605; Act of 1799, ch. 36, 1 U. S. Stats. at Large, 729; Act of 1802, ch. 51, 2 U. S. Stats. at Large, 192; Act of 1811, ch. 26, 2 U. S. Stats. at Large, 650. The Act of 1802, § 3, extends a similar provision to the case of boats, rafts, or flats, descending the Mississippi to New Orleans. In Reed *v.* Canfield, 1 Sumner, 195, 201, Mr. Justice *Story* said it seemed that these acts had been construed in practice not to impose upon ships and vessels in the whale and other fisheries, the payment of hospital money. By the Act of March 1, 1843, ch. 49, 5 U. S. Stats. at Large, 602, the provisions and penalties of the Act of 1798 are extended to registered vessels in the coasting-trade.

[4] Laws of Oleron, arts. 6, 7; Laws of Wisbuy, art. 19. Laws of the Hanse Towns, art. 39; Molloy, 243; L'Ord. de la Mar. liv. 3, tit. 4, art. 11; Valin, Comm. tome 1, p. 721; Pothier on Maritime Contracts, n. 190, Cushing's translation, 115; Pothier, Us et Const. de la Mer, p. 31; Harden *v.* Gordon, 2 Mason, 541; Walton *v.* The Ship Neptune, 1 Pet. Adm. 142; Hastings *v.* The Ship Happy Return, id. 253, 256, n.; The Forest, Ware, 420; The Brig George, 1 Sumner, 151; Reed *v.* Canfield, id. 197; Lamson *v.* Westcott, id. 591, Appen.; Johnson *v.* Huckins, 6 Law Reporter, 311; Freeman *v.*

cine chest, substituted this requisition for the more general requirement of law; but it may be doubted whether this is so, in any degree; and it seems to be well settled, that the general obligation of the law-merchant remains in force, unless the medicine chest is provided with medicines and means of medical treatment which the particular case requires, and there is sufficient skill on board to make a proper use of those medicines.[1]

Baker, 1 Blatchf. & H. Adm. 372, 382; Nevitt *v.* Clarke, Olcott, Adm. 316. In Reed *v.* Canfield, *supra*, it was held that if the seaman was injured while in the service of the ship, he was entitled to the expenses of his cure until it was completed, as far as the ordinary medical means extend, but that the owners were not liable for consequential damages. In Nevitt *v.* Clark, Olcott, Adm. 316, it was held that the owners were only liable for expenses while the seaman was in their employ. See also, The Atlantic, Abbott, Adm. 451, where this question is discussed at length. In Ringold *v.* Crocker, Abbott, Adm. 344, the seaman went on shore without leave, and on returning to the vessel, when asked by the mate why he went ashore, answered in an insolent manner, whereupon the mate struck him with a belaying pin and injured him severely. The master was boarding on shore at the time, and when the seaman went to him he placed him in a house there, and directed a physician to attend him. Held that the seaman was entitled to be cured if injured while in the service of the ship, and that he was to be deemed in the service while under the power and authority of the officers, and that an injury received in executing an improper order, or inflicted on him by the wrongful violence of an officer, would equally entitle him to this privilege.

[1] If from the nature of the disease or from other circumstances, there is no person on board by whom the medicines can be safely administered under the printed medical directions accompanying the chest, the attendance of a physician will be a charge on the owners. The Forest, Ware, 420. Cases requiring extraordinary assistance, such as surgical aid, which the medicine chest cannot supply, are not within the spirit of the statute, which it seems "is limited to the ordinary cases of illness on board the ship; a sickness of such a character that the patient may be and is kept on board, and receives or may receive the benefit of the medicine chest and directions, and the advice and assistance of the master of the ship or some other competent person, attached to the ship, in the application of the medical directions accompanying the chest, and such nursing and attendance as the situation of the ship may admit." Per *Davis*, J., in Lampson *v.* Westcott, 1 Sumner, 591, 595, Appen. See also, the remarks of *Peters*, J., in Hastings *v.* The Happy Return, 1 Pet. Adm. 253, 256, n.; and the case of Reed *v.* Canfield, 1 Sumner, 195, where a seaman, whose feet had been frozen in the service of the ship, so that partial amputation became necessary, was allowed to recover the expenses of his care from the owners under the general maritime law. The charge for nursing and attendance is not affected by the act. *Story*, J., in Harden *v.* Gordon, 2 Mason, 541. The burden of proof, as to the sufficiency of the medicine chest, is always upon the owner. The Forest, Ware, 420; The Nimrod, id. 9; Harden *v.* Gordon, *supra;* Freeman *v.* Baker, 1 Blatchf. & H. Adm. 372, 382; The William Harris, Ware, 367, 375. It was also held in this case that the captain is not a proper person to prove the sufficiency of the medicine chest, but the testimony of some reputable physician, who has examined it, is requisite. In Knight *v.* Parsons, U. S. D. C., Mass., 18 Law Reporter, 96, one of the crew of a mackerel vessel was taken

Where that is the case, a seaman has no right to demand to be taken on shore for better medical treatment, or to have a physician from on shore sent for; and if such demand is complied with, the expenses may be charged to the seaman.[1] This right of care extends to the officers of the ship, including the master.[2] If a seaman be put on shore for the safety of the crew, his disease being contagious, then, of course, the whole expense falls on the ship.[3]

SECTION VI.

OF THE RETURN OF SEAMEN TO THIS COUNTRY.

The right of the sailor to be brought back to his home, is very jealously guarded by our laws. Every ship must be provided with the shipping articles and a shipping list, verified under the

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sick, and went on shore and bought medicine, and consulted a physician. Afterwards, being worse, he was put on shore at his own request, and did not return to the vessel. There was no medicine chest on board. It was held that he was entitled to recover all these expenses, although evidence of a usage was shown to the effect that fishermen in mackerel vessels were cured at their own expense in case of sickness.

[1] Holmes *v.* Hutchinson, Gilpin, 447. And it has been held that the rule is the same, whatever may be the nature of the disease; even if it be of a violent and dangerous kind, and the physician was sent for without the request of the seaman. Pray *v.* Stinson, 21 Maine, 402. But this is certainly at variance with the authorities cited in the preceding notes.

[2] The Brig George, 1 Sumner, 151. In Winthrop *v.* Carleton, 12 Mass. 4, the master of a vessel, while in port, was taken sick with the smallpox and went to a boarding-house, where he died. The consignee paid the board, the physician's bills, and the funeral expenses, and brought this action to recover back the money so paid. The owner of the ship was held liable, a usage being shown that it was customary for the consignee to pay such charges, and look to the owners.

[3] Harden *v.* Gordon, 2 Mason, 541; Walton *v.* The Neptune, 1 Pet. Adm. 142, 152; Hastings *v.* The Happy Return, id. 253, 256, n.; The Forest, Ware, 420; The Brig George, 1 Sumner, 151. But, *semble*, not when the seaman is removed at his own request from a vessel properly provided in all respects. Pierce *v.* Patten, Gilpin, 436. See also, Pray *v.* Stinson, 21 Maine, 402. But in Johnson *v.* Doubty, 1 Ashm. 165, it was held, that a seaman, who, when sick with the yellow fever, was asked whether he would stay on board or go to the hospital, chose the latter, was entitled to full wages, on the ground that it was the duty of the master to send him ashore at all events. See also, The Atlantic, Abbott, Adm. 451, 477.

oath of the master;[1] this he is required to present to the consul or commercial agent of the United States, at every foreign port which he visits, when so requested,[2] and is under bond to deliver to the boarding officer who comes on board his ship at the first home port which he reaches, and to produce the persons named therein,[3] that it may be ascertained that he has his whole crew on board. If it appears that any of them are missing, he must account for their absence.[4] If he discharges any of them abroad, with his or their own consent, he must pay to the American consul of the port or the commercial agent, over and above the wages then due, three months' wages, of which two thirds are paid to the seaman, and one third retained by the consul and remitted to the treasury of the United States, to form a fund for the maintenance of American seamen abroad and for bringing them home.[5] If the discharge is caused by any disaster which breaks

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[1] Act of 1803, ch. 9, § 1, 2 U. S. Stats. at Large, 203.

[2] The Act of 1840, ch. 48, § 3, 5 U. S. Stats. at Large, 395, requires the master to produce the list above mentioned to the consul or other commercial agent, "whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance."

[3] Act of 1803, ch. 9, § 1, 2 U. S. Stats. at Large, 203.

[4] The bond is not forfeited, however, if any of the persons not produced have been discharged in a foreign country with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, and such consent is signified in writing under his hand and official seal, and produced to the collector with the rest of the crew, nor if any such persons have died or absconded, or have been forcibly impressed into other service, of which satisfactory proof shall be then exhibited to the collector. Act of 1803, ch. 9, § 1. Under this section it has been held that the certificate of the consul must state that the seamen were left in the foreign port with their consent, and a certificate that they were left in a hospital unable to return, and that the master had paid for their maintenance, and left the amount of their wages, was held insufficient, and parol evidence of the consent of the consul or seamen was not admitted. United States *v.* Hatch, 1 Paine, C. C. 336.

[5] Act of 1803, ch. 9, § 3, 2 U. S. Stats. at Large, 203. If a seaman is left in a foreign port, and the vessel is subsequently sold, it is doubtful if he can recover the extra wages allowed by this act in the case of sale. Nevitt *v.* Clarke, Olcott, Adm. 316. The Act of 1840, ch. 48, § 5, 5 U. S. Stats. at Large, 395, allows a consul, upon the application of both the master and any mariner under him, to discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages. And it seems that the certificate of the consul that the seaman was discharged with his own consent, is conclusive of the fact unless fraud on the part of the consul is shown. Lamb *v.* Briard, Abbott, Adm. 367. But the certificate must show on what ground the consul proceeded, and it is not enough for him to certify that he gave the discharge "lawfully," or that he gave it "in accordance with the law of the United States," but it must set forth that the discharge was made on the application of the mas-

up the voyage, so that the ship cannot be repaired and the voyage resumed in a reasonable time and at a reasonable cost, the above requirement does not apply to it.[1]

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ter and the mariner, or on that of the mariner alone. And to entitle it to the respect accorded to documents under an official signature and seal, the signature must be legible, and the impression of the seal sufficiently distinct to allow the vignette and motto to be distinguished. The Atlantic, Abbott, Adm. 451. And to avail the owner in a suit brought against him for the two months' wages, it must appear that the consul personally made an official entry of his act both upon the list of the crew, and upon the shipping articles. Miner *v.* Harbeck, Abbott, Adm. 546. In Emerson *v.* Howland, 1 Mason, 45, it was held that where seamen were discharged abroad, without the payment of the three months' wages, required by the above act, the court would enforce the payment in this country by a libel *in personam*, for wages, against the owners of the vessel. See also, Orne *v.* Townsend, 4 Mason, 541 ; The Saratoga, 2 Gallis. 164, 181 ; Wells *v.* Meldrun, 1 Blatchf. & H. Adm. 342; Pool *v.* Welsh, Gilpin, 193. But in Ogden *v.* Orr, 12 Johns. 143, the court refused to sustain an action at law brought by a seaman discharged by his own consent, in a foreign port, against the owners of a vessel, to recover two thirds of the three months' wages. The ground taken by the court was, that the statute does not require the master to pay the money to the seamen, but to the consul, and that the payment was in the nature of a penalty for the discharge of American seamen in foreign countries. See also, Van Beuren *v.* Wilson, 9 Cow. 158. The English Admiralty court has also refused to enforce this provision, on the ground of their having no jurisdiction, it being a municipal regulation of a foreign country. The Courtney, Edw. Adm. 239. — Where a vessel is sold, the seaman is entitled to his wages up to the actual sale of the vessel, and not merely to the time of the advertisement of such sale. Lang *v.* Holbrook, Crabbe, 179. The Act of 1856, ch. 127, § 26, 11 U. S. Stats. at Large, 62, makes it obligatory upon the consul, upon the application of any seaman or mariner for a discharge, if it appear that he is entitled to it under any act of congress, or according to the general principles or usages of maritime law, as recognized in the United States, to discharge him, and to require the three months' extra wages, as provided in the Act of 1803, ch. 9, and the master shall pay this in all cases, unless the consul shall be satisfied that the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, without any design to violate the articles of shipment, in which case if he deems it just he may discharge the mariner without exacting the additional pay. The three months' wages are to be held by the consul for the same purposes as provided in the Act of 1803, and if the consul neglects to require the payment of, and to collect the said wages, he shall be answerable to the United States, and to the seaman, respectively, for their shares of such wages.

[1] The Dawn, Ware, 485, Daveis, 121 ; Henop *v.* Tucker, 2 Paine, C. C. 151 ; The Saratoga, 2 Gallis. 164, 181. This is now so provided by statute in the case of wrecked or stranded vessels, or where they are condemned as unfit for service. Act of 1856, ch. 127, § 26, 11 U. S. Stats. at Large, 62. In Brown *v.* The Independence, Crabbe, 54, it was held, where a seaman was injured by the mate, and the police authorities of the place took him on shore to the hospital without his request, and against the will of the master, who also wanted to take him away with him when he left, that the seaman was not entitled to the benefit of the Act of 1803.

The ship must be repaired,[1] or if captured, all proper means used to obtain restoration, and the seamen may hold on, a reasonable time, for this purpose. And if discharged before, they may claim their extra wages.[2] Our consuls and commercial agents may authorize the discharge of a seaman for good cause, but this must be disobedience, or misconduct, or disability by his own fault, of an extreme degree.[3] If the stipulations of the shipping articles are violated by the master,[4] if the vessel be un-

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[1] Pool *v.* Welsh, Gilpin, 193; The Dawn, Ware, 485. In Wells *v.* Meldrun, 1 Blatchf. & H. Adm. 342, it was held that where a vessel was condemned, in a foreign port, as unseaworthy, and sold on that account, and the voyage relinquished, the seamen were entitled to their extra wages under the act. *Betts*, J., states the reasons of the decision, as follows: "The necessity for the sale, in this instance, for unseaworthiness, was not the result of any casualty to the vessel; nor was the sale compulsory, under any coercion, judicial or administrative, at the foreign port, so as to take away the discretion and free action of the master. There is no proof that the vessel was even irreparable, or that the unseaworthiness was more than the result of the natural wear of the ship on her voyage, or of her imperfect condition when sent to sea."

[2] The Saratoga, 2 Gallis. 164; Emerson *v.* Howland, 1 Mason, 45.

[3] Under the Act of 1803, ch. 9, § 1, 2 U. S. Stats. at Large, 203, a discharge of a seaman in a foreign port, in order to justify a master for not producing him on the return of the vessel, must have been "with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent, there residing, signified in writing under his hand and official seal." In regard to what degree of misconduct will justify the master in putting an end to the contract with seamen, see cases *infra*. In Hutchinson *v.* Coombs, Ware, 65, 70, *Ware*, J., after admitting that, by the marine law, a master could, in certain cases, turn a mariner out of the vessel, said: "But this he cannot do for slight or venial offences, and certainly not for a single offence, unless of a very aggravated character. The cases stated, in which a master is permitted to discharge a seaman are, when he is incorrigibly disobedient, and will not submit to do his duty, Thorne *v.* White, 1 Pet. Adm. 168, 175; or if he is mutinous and rebellious, and persists in such conduct, Relf *v.* The Maria, 1 Pet. Adm. 186; or guilty of gross dishonesty, as embezzlement or theft, Black *v.* The Louisiana, 2 Pet. Adm. 268; or if he is an habitual drunkard, a stirrer up of quarrels and broils, to the destruction of the discipline of the crew; or by his own fault renders himself incapable of performing his duty." In Nieto *v.* Clark, U. S. D. C., Mass., Boston Courier, March 23, 1858, it was held that the master was justified in discharging a seaman who entered the state-room of a lady passenger, and conducted himself there in a grossly indecent manner. See also, Orne *v.* Townsend, 4 Mason, 541, 548; Whitton *v.* The Ship Commerce, 1 Pet. Adm. 160, 164; Atkyns *v.* Burrows, id. 244, 248. The Nimrod, Ware, 9. If the seaman is taken from a vessel in a foreign port and sent home for a crime, his contract with the vessel is at an end, and he cannot recover any wages subsequently accruing. Smith *v.* Treat, Daveis, 266. So, if the seaman is sent home by the consul. Tingle *v.* Tucker, Abbott, Adm. 519.

[4] Act of 1840, ch. 48, § 9, 5 U. S. Stats. at Large, 395.

seaworthy,[1] or the seaman subjected to cruel treatment, he may be discharged by the consul or commercial agent, and his three months' wages allowed him, as if it were a voluntary discharge by the master. And this even if the sailor has deserted the ship by reason of such cruelty.[2]

They may also send home our seamen in other ships, which are bound to take them, for a compensation not exceeding ten dollars for each man, and the sailor so sent is bound to work and obey as if he had originally shipped in that vessel.[3] If a master discharges a seaman against his consent and without good cause, in a foreign port, he is liable to a fine of five hundred dollars or six months' imprisonment.[4] And the seaman may recover besides, full indemnity for his time lost or expenses incurred by reason of such discharge.[5]

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[1] Act of 1840, § 14.

[2] Act of 1840, § 17.

[3] Act of 1803, ch. 9, § 4, 2 U. S. Stats. at Large, 204. This act provides a penalty of one hundred dollars, in case any master refuses to bring home destitute seamen. In Matthews *v.* Offley, 3 Sumner, 115, it was held that an action for this penalty must be brought in the name of the government. It was also held in this case, that if the seaman deserted from an American ship, and she was in port at the time he became destitute, the consul might require another American vessel to bring him home. It was also held that foreigners, while employed as seamen on American ships, are entitled to the privileges of the act; and, that the certificate of the consul is *primâ facie* evidence of all the facts stated in the enacting clause of the section, which are necessary to bring the case within the penalty.

[4] Stat. 1825, ch. 65, § 10, 4 U. S. Stats. at Large, 117. In United States *v.* Netcher, 1 Story, 307, Mr. Justice *Story*, speaking of the tenth section of the above act, said: "In my judgment, this section enumerates three distinct and independent offences. 1. The maliciously and without justifiable cause, forcing any officer or mariner on shore in any foreign port. 2. The maliciously and without justifiable cause, leaving such officer or mariner behind in any foreign port; and 3. The maliciously and without justifiable cause, refusing to bring home again all the officers and mariners of the ship in a condition to return and willing to return on the homeward voyage." In United States *v.* Ruggles, 5 Mason, 192, "maliciously" in this act was held to mean an act wantonly done, that is with a wilful disregard of right and duty, an act done contrary to a man's own convictions of duty. See also, United States *v.* Coffin, 1 Sumner, 394; United States *v.* Lunt, 18 Law Reporter, 683.

[5] In Emerson *v.* Howland, 1 Mason, 45, 53, Mr. Justice *Story* said: "In some adjudged cases, indeed, wages up to the successful termination of the voyage, have been allowed; in others, wages up to the return of the seaman to the country, where he was originally shipped, without reference to the termination of the voyage. The Beaver, 3 Rob. Adm. 92; The Ship Exeter, 2 Rob. Adm. 261; Hoyt *v.* Wildfire, 3 Johns. 518; Brooks *v.* Dorr, 2 Mass. 39; Ward *v.* Ames, 9 Johns. 138; Sullivan *v.*

SECTION VII.

OF THE DISOBEDIENCE OF SEAMEN.

Disobedience, or misconduct of a sailor is, of necessity, punishable with great severity, because discipline must be preserved, as without it the ship would always be in great peril, and no voyage could be successfully conducted.[1] Formerly, there was

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Morgan, 11 Johns. 66; Rice *v.* The Polly and Kitty, 2 Pet. Adm. 420, 423, note; The Gloucester, 2 Pet. Adm. 403, 406, note; The Littlejohn, 1 Pet. Adm. 115, 119, 120. But these apparent contrarieties are easily reconcilable, when the circumstances of each case are carefully examined. In all the cases, a compensation is intended to be allowed, which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time, and the expenses incurred by the party. It is presumed that after his return home, or after the lapse of a reasonable time for that purpose, the seaman may, without loss, engage in the service of other persons, and where this happens to be the case, wages are allowed only until his return, although the voyage may not then have terminated. On the other hand, if the voyage have terminated before his return, or before a reasonable time for that purpose has elapsed, wages are allowed up to the time of his return, for otherwise he would be without any adequate remedy. Cases, however, may occur of such gross and harsh misbehavior, or wanton injustice, as might require a more ample compensation than could arise from either rule." See also, The Union, 1 Blatchf. & H. Adm. 545; Farrell *v.* French, 1 Blatchf. & H. Adm. 275; The Maria, id. 331; Brunent *v.* Taber, U. S. D. C., Mass., 18 Law Reporter, 685; Nevitt *v.* Clarke, Olcott, Adm. 316; The Nimrod, Ware, 9; Hutchinson *v.* Coombs, id. 65; Ex parte Giddings, 2 Gallis. 56. No deductions are made except that the wages earned on the homeward voyage are to be deducted from the expenses allowed for the return. Emerson *v.* Howland, 1 Mason, 45, 54; Hutchinson *v.* Coombs, Ware, 65. In Sheffield *v.* Page, U. S. D. C., Mass., 18 Law Reporter, 99, the mate was tortiously discharged at Calcutta. No situation was offered him as mate, and he came home before the mast. Held that the wages thus earned by him should not be deducted from the amount decreed against the owner. See Hoyt *v.* Wildfire, 3 Johns. 518; Nevitt *v.* Clarke, Olcott, Adm. 316, 320. Where seamen were turned off from a privateer without lawful cause, they were held to be entitled to their proportion of the prizes taken during their absence. Mahoon *v.* The Glocester, 2 Pet. Adm. 403. — As a general rule of law a breach of a statute by a master, which subjects him to a penalty, does not take away the right of a seaman, who has been injured, in consequence of such breach. Couch *v.* Steel, 3 Ellis & B. 402, 24 Eng. L. & Eq. 77.

[1] Thorne *v.* White, 1 Pet. Adm. 168; Gardner *v.* Bibbins, 1 Blatchf. & H. Adm. 356; The Elizabeth Frith, id. 195, 208; The United States *v.* Wickham, 1 Wash. C. C. 316; Jordan *v.* Williams, 1 Curtis, C. C. 69; United States *v.* Smith, 3 Wash. C. C. 525; Michaelson *v.* Denison, 3 Day, 294; United States *v.* Freeman, 4 Mason,

no specific limit to the right of punishment. It might be administered by the master in any form, and in any measure, he always being answerable for his excess or cruelty, both criminally[1] and in damages to the seaman.[2] But if the mate, in

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505, 512; Carleton *v.* Davis, Daveis, 221; Turner's case, Ware, 83; United States *v.* Peterson, 1 Woodb. & M. 305; Fuller *v.* Colby, 3 id. 1. See also cases *infra*. In Sheridan *v.* Furbur, 1 Blatchf. & H. Adm. 423, it was held that general orders from one officer would not excuse disobedience to the specific orders of another.

A hammer is an improper weapon to strike a seaman with, nor is it any excuse that the weapon was casually in the hands of the captain, and that he used it in a moment of excitement, and under circumstances, which would have justified some punishment. Saunders *v.* Buckup, 1 Blatchf. & H. Adm. 264. So a sword is an improper weapon to strike a seaman with, but a bucket of water thrown over a person to make him move quicker, has been held to be no severe punishment, especially in the month of August. Schelter *v.* York, Crabbe, 449. And it has been held in the same court, that a blow with a dirty frying-pan, or wiping a dirty knife on the face of the person, whose duty it was to keep these articles clean, is not a very aggravated or cruel assault. Forbes *v.* Parsons, Crabbe, 283. See also, Benton *v.* Whitney, id. 417. A belaying pin is an improper instrument for punishment. Carleton *v.* Davis, Daveis, 221; Shorey *v.* Rennell, U. S. D. C., Mass., 1858, per *Sprague*, J.; Ringold *v.* Crocker, Abbott, Adm. 344; as is a log of firewood. Brown *v.* The Independence, Crabbe, 54. But if a person is indicted for committing an assault with a dangerous weapon, it is a question for the jury, and not for the court, whether the instrument used was a dangerous weapon. United States *v.* Small, 2 Curtis, C. C. 241. In Jarvis *v.* Sherwood, Bee, Adm. 248, it is held that a cutlass should only be used when a mutiny exists or is threatened, but moderate correction with the fist is justifiable. This case also decides that a captain who encourages disorderly conduct in his men is the less excusable for inflicting unusual punishment for conduct arising, in some measure, out of that.

[1] Act of 1825, ch. 65, § 22, 4 U. S. Stats. at Large, 122; Act of 1835, ch. 40, § 3, 4 U. S. Stats. at Large, 776. For decisions under the former of these acts, see United States *v.* Grush, 5 Mason, 290; United States *v.* Hunt, 2 Story, 120. In United States *v.* Cutler, 1 Curtis, C. C. 501, the master was indicted under the Act of 1835, for beating one of his crew with malice and without justifiable cause. *Curtis*, J., said: "The government must prove: 1, the beating; 2, the want of justifiable cause; 3, malice." See also, United States *v.* Alden, 7 Law Reporter, 469; United States *v.* Winn, 3 Sumner, 209; United States *v.* Small, 2 Curtis, C. C. 241. Although flogging is now abolished, yet it is not a cruel and unusual punishment, within the meaning of the third section of the Act of 1835. United States *v.* Collins, 2 Curtis, C. C. 194.

[2] In Forbes *v.* Parsons, Crabbe, 282, it was held that a seaman is, in general, entitled to recover damages for an assault from the master, first, where personal violence is inflicted, not excessively, but wantonly, and without provocation or cause; second, where there was provocation and cause, but the punishment was cruel, or excessive; third, where the punishment is inflicted with a dangerous weapon. See also, The Agincourt, 1 Hagg. Adm. 271; Watson *v.* Christie, 2 B. & P. 224; Shorey *v.* Rennell, U. S. D. C., Mass., 1858; Brown *v.* Howard, 14 Johns. 119; Sampson *v.* Smith, 15 Mass. 365; Rice *v.* The Polly & Kitty, 2 Pet. Adm. 420; Roberts *v.* Dallas, Bee, Adm. 239; Jarvis *v.* Sherwood, Bee, 248; Jenks *v.* Lewis, Ware, 51; 3 Mason, 503; Elwell *v.* Martin, Ware, 53; Butler *v.* McLellan, id. 219; Hutson *v.* Jordan, id.

obedience to the commands of the master, assists him in punishing a seaman, he will not be answerable as a joint trespasser, unless the punishment is obviously and grossly excessive and unjust.[1] Seamen have a right to the protection of the master against illegal violence from the other officers of the vessel, and he is bound to hear their complaints and prevent a repetition of their wrongs. If, therefore, seamen are illegally treated by the mate, and the captain refuses to hear their complaints, and the ship is in port and safely moored, the seamen are entitled to their discharge.[2] It has also been held that no one but the highest officer on board can inflict punishment for a past offence for the purpose of reformation or example.[3] Now, however, flogging is abolished and prohibited by law.[4] This has been declared, by very high authority, to include the use of the cat, and every similar form of punishment; but not necessarily to include all corporal punishment, such as a blow with the hand, or a stick or rope;[5] and in a case tried in Boston in the Common

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385; Polydore *v.* Prince, id. 402; Bangs *v.* Little, id. 506; Pettingill *v.* Dinsmore, Daveis, 208; Thomas *v.* Lane, 2 Sumner, 1; Morris *v.* Cornell, 6 Law Reporter, 304, 310; Whitney *v.* Eager, Crabbe, 422; Sheridan *v.* Furbur, 1 Blatchf. & H. Adm. 423.

[1] Butler *v.* McLellan, Ware, 219.

[2] Shorey *v.* Rennell, U. S. D. C., Mass., 1858.

[3] Ibid.

[4] Act of 1850, ch. 80, 9 U. S. Stats. at Large, 515, contains the following clause: "Provided, That flogging in the navy, and on board vessels of commerce, be, and the same is hereby abolished, from and after the passage of this act." Mr. Justice *Curtis*, in a charge to the grand jury, delivered at Providence, R. I., November 15, 1853, instructed them that the words "vessels of commerce," in the above statute, included vessels engaged in the whale and other fisheries. 1 Curtis, C. C. 509. So held also in United States *v.* Cutler, 1 Curtis, C. C. 501. The Act of 1850 is not a penal law, and no indictment can be framed upon it. But it has an important bearing upon the Act of 1835, in regard to the question of justifiable cause and malice. Same case. In a case decided by Mr. Justice *Sprague*, in the District Court of the United States for the Massachusetts District, February, 1857, Captain Lendholm of the ship Josephine was charged with maltreating his crew of Lascars. The court held that although the captain was apparently honest in the belief that the men had conspired to poison him, yet he had no right to flog them.

[5] Charge to the Grand Jury, 1 Curtis, C. C. 509. In United States *v.* Cutler, 1 Curtis, C. C. 501, the master of a vessel was indicted under the Act of 1835, for beating one of his crew maliciously, and without justifiable cause. The master had punished the seaman by inflicting six blows upon him with a piece of ratlin stuff. Mr. Justice *Curtis* said: "If the punishment inflicted was the punishment of flogging, within the meaning of the Act of 1850, there could be no justifiable cause, the author-

Pleas, February, 1854, it was held, on what seems to us to be good reasons, that the statute was intended to apply to deliberate flogging by way of punishment, and not to a blow or blows of any kind inflicted upon an emergency to produce immediate obedience.[1] Generally the only punishments which can now be resorted to, to enforce obedience and good conduct, are, forfeiture of wages,[2] irons,[3] imprisonment,[4] hard labor,[5] or such other means

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ity of the master to punish by flogging being taken away. And it is for the jury to find whether what was done, amounted to the punishment of flogging abolished by that act. In order to decide this question, it is necessary for the jury to attend to what is the punishment of flogging referred to in that law; and my instruction is, that it is corporal punishment by stripes inflicted with a cat, or any punishment which, in substance and effect, amounts thereto. The particular form of the instrument is not material; what you must look to is the effect produced. If the man was punished by stripes, inflicted with a rope, and this, in substance and effect, is the same *kind* of punishment as the punishment of flogging with a cat, then it is prohibited by this law. The degree of severity of the punishment is not material. It is the kind, and not the degree, of punishment which is important. It may be, that one blow with a cat would inflict stripes more painful to be borne, than one blow with a piece of ratlin stuff. But this is not material, if both are corporal punishment by stripes, and both are in substance the same kind of punishment."

[1] And *Sprague*, J., in the case of Shorey *v.* Rennell, U. S. D. C., Mass., 1858, said: "Any officer may use violence when necessary to coerce the performance of a duty, when an exigency requires instant obedience."

[2] Relf *v.* Ship Maria, 1 Pet. Adm. 186; Atkyns *v.* Burrows, id. 244; Thorne *v.* White, id. 168; Buck *v.* Lane, 12 S. & R. 266.

[3] Turner's Case, Ware, 83; Macomber *v.* Thompson, 1 Sumner, 384, 389; Sampson *v.* Smith, 15 Mass. 365, 369; Shorey *v.* Rennell, U. S. D. C., Mass., 1858.

[4] Under some circumstances the master may imprison the seamen on shore. United States *v.* Ruggles, 5 Mason, 192; Relf *v.* Ship Maria, 1 Pet. Adm. 186; Wood *v.* The Nimrod, Gilpin, 83, 89. But, as is said by Mr. Justice *Hopkinson*, in Wilson *v.* The Mary, Gilpin, 31, 32, "The practice of imprisoning disobedient and refractory seamen in foreign gaols is one of doubtful legality. It is certainly to be justified only by a strong case of necessity. It is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be danger in keeping the offender on board, or some great crime committed when this extreme measure is resorted to. It should be used as one of safety rather than discipline, and never applied as a punishment for past misconduct. The powers given by the law to the master, to preserve the discipline of his ship, and compel obedience to his authority, are so strong and full, that they can seldom fail of their effect: they should be clearly insufficient, before we should allow the exercise of a power which may so easily be

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[5] In Allen *v.* Hallet, Abbott, Adm. 573, it was held in an action brought against a master by a cook who had secreted himself on board, to recover damages for being punished for refusal to obey orders, that it was incumbent on the master to prove, in order to justify the punishment, that the man possessed the experience and capacity which would enable him to fulfil the order with safety.

as may be invented to take the place of flogging. In connection with this subject we will consider briefly the offences for which

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made an instrument of cruelty and oppression, and may be so terrible in its consequences." See also, Thorne *v.* White, 1 Pet. Adm. 168, 175, note; Magee *v.* The Moss, Gilpin, 219; The Nimrod, Ware, 9, 18; The William Harris, id. 367; The David Pratt, id. 496, 503; Jay *v.* Almy, 1 Woodb. & M. 262; Snow *v.* Wope, 2 Curtis, C. C. 301; Johnson *v.* Ship Coriolanus, Crabbe, 239; Gardner *v.* Bibbins, 1 Blatchf. & H. Adm. 356; Buddington *v.* Smith, 13 Conn. 334. "When a master of a ship thinks it necessary to cause any of his crew to be confined in a foreign jail, he should pay some regard to their condition and treatment there, and should from personal examination, see that they are such as humanity requires." Per *Sprague*, J., Shorey *v.* Rennell, U. S. D. C., Mass., 1858. If a seaman is imprisoned by the authorities of a foreign country for the violation of its laws, the costs and charges may be deducted from his wages. Magee *v.* The Moss, Gilpin, 219. But if he is imprisoned by the master, neither the costs and charges, nor the pay for the hire of another, are to be deducted from his wages. Same case. See also, Thorne *v.* White, 1 Pet. Adm. 168, 176, note; Wilson *v.* The Mary, Gilpin, 31; Wood *v.* The Nimrod, id. 83, 89; The Nimrod, Ware, 9, 19; The William Harris, id. 367; Johnson *v.* Ship Coriolanus, Crabbe, 239; The Maria, 1 Blatchf. & H. Adm. 331; Thomas *v.* Gray, id. 493. But see Jordan *v.* Williams, 1 Curtis, C. C. 69, 86. In Johnson *v.* Ship Coriolanus, *supra*, it was held that the certificate of a consul setting forth the facts that led to the imprisonment was not evidence, and afforded no justification for the master, and that the court would examine the whole question *de novo*, and determine whether the imprisonment was justifiable. See also to the same effect, Brown *v.* Brig Independence, Crabbe, 54; Wilson *v.* The Mary, *supra;* The William Harris, Ware, 367, 372. The eleventh section of the Act of 1840, ch. 48, 5 U. S. Stats. at Large, 395, is as follows: "It shall be the duty of consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner." In Jordan *v.* Williams, 1 Curtis, C. C. 69, 80, this section was considered to change the law above stated, and it was there held that if the master in a foreign port lays a complaint against any of his crew before the consul, and the latter, upon examination, finds it expedient or necessary to make use of the local authorities, the master is not responsible for their imprisonment as for a tort, the consul being answerable to the injured party for any malversation or abuse of power. See also, Tingle *v.* Tucker, Abbott, Adm. 519. But, if the consul is absent, his clerk or assistant has no power to procure the interposition of the local authorities, and if the master imprison a seaman, he is liable as for a tort. Snow *v.* Wope, 2 Curtis, C. C. 301. In Shorey *v.* Rennell, U. S. D. C., Mass., 1858, *Sprague*, J., said: "Upon the authority of the case of Jordan *v.* Williams, the captain must be exonerated from liability for the imprisonment on shore by the order and warrant of the consul. But I cannot extend the same immunity to what was done on board the ship. There the captain was supreme, and must be responsible in damages for wrongs done to his men by his authority or acquiescence. The instructions of the consul might avail him much in a criminal prosecution, in which malice is an essential agreement, and a mistake without evil intent would be a good defence, but in a civil suit the question is whether a wrong has been done to the libellants, and if so they are entitled to indemnity."

the penalty of forfeiture of wages is imposed. A trivial act of irregularity will not work a forfeiture,[1] nor will a single act of intemperance, nor an occasional act, but it must be habitual to have this effect.[2] If, during the voyage, either the master or a seaman smuggle goods, he either forfeits all his wages, or the damage actually sustained by the owners of the vessel may be charged upon his wages.[3] Embezzlement by the master or crew also works a forfeiture.[4] In England it seems that the court have

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[1] The Gondolier, 3 Hagg. Adm. 190. In The Blake, 1 W. Rob. 73, 74, Dr. *Lushington* said: "Wages may be forfeited, not in cases of discharge for mere misconduct alone, but where the misconduct has been such as to render the discharge of the seaman imperatively necessary for the safety of the ship and the due preservation of discipline." "The disobedience must be either an act of a very gross nature, involving serious danger, or mischief, or malignancy; or it must be habitual, and produce such a general diminution of duty, as goes to the very essence of the contract." Per *Story*, J., The Ship Mentor, 4 Mason, 84, 92. See also, Drysdale *v.* Sch. Ranger, Bee, Adm. 148; The Maria, 1 Blatchf. & H. Adm. 331. In a suit for wages where misconduct is set up as a defence, there must be a special allegation of the facts with due certainty of time, place, and other circumstances. Macomber *v.* Thompson, 1 Sumner, 384.

[2] The New Phœnix, 1 Hagg. Adm. 198; The Lady Campbell, 2 Hagg. Adm. 5; The Ealing Grove, id. 15; The Malta, id. 158, 168; The Duchess of Kent, 1 W. Rob. 283.

[3] Willard *v.* Dorr, 3 Mason, 161; Freeman *v.* Walker, 6 Greenl. 68; Scott *v.* Russell, Abbott, Adm. 258.

[4] This is a well-settled principle of maritime law, Alexander *v.* Galloway, Abbott, Adm. 261. But the question how far a seaman is liable where an embezzlement is proved to have taken place, but the actors in it are not known, is one of a difficult nature, and the decisions respecting it are conflicting, though we consider the matter as virtually at rest at the present time. In Crammer *v.* The Ship Fair American, 1 Pet. Adm. 242, Mr. Justice *Peters* held, that in case of an embezzlement all the crew, including the captain and officers, were bound to contribute for the damage sustained, although one of the crew was on shore, and confined in prison at the time of the embezzlement, the learned judge remarking: "The innocence of an individual is not the question; it turns on the joint obligation of all, to make retribution; it is part of the conditions upon which they engage in their occupation." In Mariners *v.* Ship Kensington, 1 Pet. Adm. 239, where the defence was, that certain laborers, who assisted in stowing the vessel, embezzled the goods, the court held, that the burden was on the seamen to prove this fact, and, there being no direct evidence who committed it, the seamen were held liable. The severity of the rule laid down in these decisions was somewhat modified in Sullivan *v.* Ingraham, Bee, Adm. 182, where proof that some of the crew could not have committed the offence was admitted. And in Knap *v.* Brig Eliza and Sarah, 1 Pet. Adm. 200, where the mate and two seamen were sent ashore in a boat, and one of the men was sent off on the business of the ship, after which the mate and the other seaman left, and the boat was stolen, it was held, that only the two latter were liable. And in Lewis *v.* Davis, 3 Johns. 17, *Kent*, C. J., held, that where part of the crew were on shore by permission of the mate, the master not being on board, and goods were stolen in their absence, they were not liable. In Spurr *v.* Pearson, 1 Mason, 104,

only power to decree the whole wages forfeited or none.[1] But in this country, a part may be forfeited according to the nature of the offence.[2] Only those wages earned before the act of misconduct, are forfeited.[3] So if the mate is promoted during the voyage, and while master, commits an offence, it cannot be set up as working a forfeiture of the wages earned as mate.[4] If the seaman repents and offers to return to duty, the master should receive him, and, if he does so, this acts as a condonation of the offence.[5] And if he punishes him severely the forfeiture is considered as remitted.[6]

Mr. Justice *Story*, after an elaborate review of the authorities, stated as his opinion: "That where the embezzlement has arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to it, in proportion to their wages; that where the embezzlement is fixed on an individual, he is solely responsible: that where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute; but that where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master: that in no case are the innocent part of the crew to contribute for the misdemeanors of the guilty; and further, that in a case of uncertainty, the burden of the proof of innocence does not rest on the crew; but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded." See also, Joy *v.* Allen, 2 Woodb. & M. 303. The rule in England is similar. Thompson *v.* Collins, 4 B. & P. 347; The Prince Frederick, 2 Hagg. Adm. 394; The Duchess of Kent, 1 W. Rob. 283, 285. In Anderson *v.* Sloop Solon, Crabbe, 17, it was held not to be embezzlement for a seaman to sell part of the cargo by direction of the mate in order to procure provisions for the vessel, the master being permanently liable. Nor are the crew liable if a slave, who is entered on board as seaman, escapes. Carey *v.* Sch. Kitty, Bee, Adm. 255.

[1] The Blake, 1 W. Rob. 73, 87.

[2] Sprague *v.* Kain, Bee, Adm. 184; Humphreys *v.* Brig America, Bee, Adm. 237; Macomber *v.* Thompson, 1 Sumner, 384; The Maria, Blatchf. & H. Adm. 331; The Moslem, Olcott, Adm. 300; Orne *v.* Towusend, 4 Mason, 541; Mitchell *v.* The Ship Orozimbo, 1 Pet. Adm. 250.

[3] The Ship Mentor, 4 Mason, 84; Smith *v.* Treat, Daveis, 266.

[4] The Brig Ann C. Pratt, 1 Curtis, C. C. 395, 398.

[5] Atkyns *v.* Burrows, 1 Pet. Adm. 244; Horne *v.* White, id. 168; Black *v.* The Ship Louisiana, 2 Pet. Adm. 268; Relf *v.* The Ship Maria, 1 Pet. Adm. 186; Dixon *v.* The Ship Cyrus, 2 Pet. Adm. 407; Johnson *v.* The Eliza, U. S. D. C., Mass., Abbott on Shipping, 652, n.; The Ship Mentor, 4 Mason, 84; Drysdale *v.* Schooner Ranger, Bee, Adm. 148.

[6] Sprague *v.* Kain, Bee, Adm. 184; Buck *v.* Lane, 12 S. & R. 266. In The Ship Moslem, Olcott, Adm. 289, 300, Mr. Justice *Betts* said: "The after submission of the men to the authority of the ship, and return to duty, with the acquiescence of the master, and their continuing to serve on board until her arrival at Pernambuco, should

SECTION VIII.

OF THE DESERTION OF SEAMEN.

Desertion is an offence which it is of great importance to prevent, as otherwise a ship, with all her cargo, might be left unmanageable. It is distinguished from absence without leave, by the intention not to return.[1] But it is desertion to refuse to

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operate in equity to preserve the wages agreed in the shipping articles. I do not hold the transaction an entire condonation of their offence, yet I do not think the master should be allowed to inflict corporeal punishment sufficient to bring the men back to duty, avail himself of their services, and then exact a confiscation of their whole wages for conduct, although highly disorderly and mutinous, yet based upon colorable grounds of wrong towards them, and of right on their part to hold themselves discharged of all obligation to the ship."

[1] Cloutman *v.* Tunison, 1 Sumner, 373, 375; Coffin *v.* Jenkins, 3 Story, 108; Spencer *v.* Eustis, 21 Maine, 519; The Rovena, Ware, 309; The Brig Cadmus *v.* Matthews, 2 Paine, C. C. 229; Borden *v.* Hiern, Blatchf. & H. Adm. 293; The Union, id. 545, 552; Ship Union *v.* Jansen, 2 Paine, C. C. 277; The Westmorland, 1 W. Rob. 216; The Two Sisters, 2 W. Rob. 125. In The Westmorland, it was held, that the going on shore without leave to seek advice as to the effect of the articles, was not a desertion by the maritime law. So it has been uniformly held, that it is not desertion for the seamen to leave the vessel against orders to go before the consul, at a foreign port, to complain of their treatment. Freeman *v.* Baker, Blatchf. & H. Adm. 372; Hart *v.* The Brig Otis, Crabbe, 52. The Act of 1840, ch. 48, § 16, 5 U. S. Stats. at Large, 396, provides that "the crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained, or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith; stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon it shall be the duty of such consul or commercial agent to repair on board, and inquire into the causes of the complaint, and to proceed thereon as this act directs." In Morris *v.* Cornell, 6 Law Reporter, 304, 309, Mr. Justice *Sprague* said of this act: "It may be called the *habeas corpus* of the seaman, and the court will carefully and vigorously guard its inviolability." The right of the seaman under this act to lay his complaints before the consul has been held to extend only to those complaints over which the consul has jurisdiction, as where the seaman is detained contrary to his agreement, or after he has fulfilled it, or where the vessel is unseaworthy, but not to a case of complaint by the seamen that they are badly treated. But even if they have a right to see the consul, they cannot refuse to attend to duty at any moment until they have seen him, unless such refusal is abso-

return when ordered, after an absence without leave,[1] or other temporary separation; as by capture, or wreck.[2] Desertion is justified, or rather it is not desertion, when the vessel is left for good cause, as a change of the voyage without consent,[3] cruelty,[4] insufficient provisions,[5] or unseaworthiness of the ship.[6] It has been held that if desertion is attempted to be justified on the ground that the deserter was a negro, and that the captain threatened to sell him as a slave, it must be averred that the place where the threat was to be executed was one where slaves could be sold.[7] If the seaman returns after desertion, and is received by the master or by the owner, this is a condonation of the

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lutely necessary to prevent the loss of that right. The master is to be allowed some discretion as to the time and mode of landing. Jordan *v.* Williams, 1 Curtis, C. C. 69.

[1] The Bulmer, 1 Hagg. Adm. 163; Piehl *v.* Balchen, Olcott, Adm. 24.

[2] Boardman *v.* The Brig Elizabeth, 1 Pet. Adm. 128.

[3] The Cambridge, 2 Hagg. Adm. 243; Moran *v.* Baudin, 2 Pet. Adm. 415; Ingraham *v.* Albee, Blatchf. & H. Adm. 289; United States *v.* Matthews, 2 Sumner, 470. See also, cases ante, p. 443, note 3. But the crew are not justified in such a case in seizing the vessel and bringing it home. The Mary Ann, Abbott, Adm. 270.

[4] The Minerva, 1 Hagg. Adm. 347, 368; Limland *v.* Stephens, 3 Esp. 269; Prince Edward *v.* Trevellick, 4 Ellis & B. 59, 28 Eng. L. & Eq. 205; Ward *v.* Ames, 9 Johns. 138; Relf *v.* The Ship Maria, 1 Pet. Adm. 186, 193; Rice *v.* The Polly and Kitty, 2 id. 420; Sherwood *v.* McIntosh, Ware, 109; The America, Blatchf. & H. Adm. 185. In Steele *v.* Thatcher, Ware, 91, 94, Mr. Justice *Ware* said: "I am, as at present advised, far from being prepared to hold that a battery, simply because it is excessive, will be a justification, even though it should pass very considerably beyond the limits of a moderate discretion. As a general rule, it seems to me that another ingredient should enter into the case. The seaman who proposes, on this ground, to justify a desertion, should not only exhibit proof of the injury, but a just and reasonable ground of apprehension that it would be causelessly repeated, either by showing a general disposition to cruelty on the part of the master, or the existence of some particular pique or malevolence toward him personally." See also, Magee *v.* The Moss, Gilpin, 219, 228.

[5] If no provisions at all are provided, then it is clear that a desertion for this cause is justifiable. The Castalia, 1 Hagg. Adm. 59; The Eliza, id. 182, 186; Dixon *v.* The Ship Cyrus, 2 Pet. Adm. 407. See also, Sigard *v.* Roberts, 3 Esp. 71. But to justify a desertion on account of bad provisions, it must be shown that the food is not merely not of the best, but positively bad and unfit for the support of the crew. Ulary *v.* The Ship Washington, Crabbe, 204.

[6] In Savory *v.* Clements, Sup. Jud. Ct., Mass., March T. 1857, 20 Law Reporter, 296, an action was brought by a seaman for work and labor done, etc. The defence was desertion. On the trial it appeared that the ship was unseaworthy, and the court held, that the plaintiff was entitled to recover. See also, Bray *v.* Ship Atalanta, Bee, Adm. 48; Bucker *v.* Klerkgeter, Abbott, Adm. 402; and cases ante, p. 454, note 1.

[7] Prince Edward *v.* Trevellick, 4 Ellis & B. 59, 28 Eng. L. & Eq. 205.

offence and a waiver of the forfeiture;[1] and it has this effect even if there be a clause to the contrary in the shipping articles.[2] He must be received if he offer to return in a proper way, and within a reasonable time, before any other person is engaged to take his place.[3] If he desert before the voyage begins, by not rendering himself on board, he forfeits the advance wages and an equal sum in addition;[4] or he may be apprehended under the warrant of a justice, and compelled forcibly to go on board;[5] but if this be done the forfeiture is waived.[6] It has, however, been held, that receiving a seaman on board after the proper time is no waiver of the penalty.[7] He may be apprehended if he deserts on the voyage.[8] And for such desertion he forfeits all his wages,

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[1] Miller *v.* Brant, 2 Camp. 590; Beale *v.* Thompson, 4 East, 546; Train *v.* Bennett, 3 Car. & P. 3; Whitton *v.* The Brig Commerce, 1 Pet. Adm. 160; Cloutman *v.* Tunison, 1 Sumner, 373; Austin *v.* Dewey, 1 Hall, 238; The Ship Elizabeth *v.* Rickers, 2 Paine, C. C. 291; Ingraham *v.* Albee, Blatchf. & H. Adm. 289.

[2] Lang *v.* Holbrook, Crabbe, 179; Freeman *v.* Baker, Blatchf. & H. Adm. 372.

[3] The Rovena, Ware, 309, 320; Cloutman *v.* Tunison, 1 Sumner, 373; Coffin *v.* Jenkins, 3 Story, 108, 119. See also, cases post.

[4] The second section of the Act of 1790, ch. 29, 1 U. S. Stats. at Large, 131, provides that if the mariner shall neglect to render himself on board, at the time mentioned in the contract, and if the master, or other officer, shall, on that day, make an entry in the log-book of the name of the mariner, and the time that he neglected to render himself (after the time appointed); such mariner shall forfeit for every hour which he shall so neglect to render himself, one day's pay according to the rate agreed upon, to be deducted out of his wages. And if he shall not render himself on board at all, or, after he is on board, shall desert, then he forfeits the advance wages, and an equal sum in addition. See Cotel *v.* Hilliard, 4 Mass. 664.

[5] Act of 1790, ch. 29, § 7, 1 U. S. Stats. at Large, 134. It is provided by this section that if the seaman, who has signed a contract to perform the voyage, shall desert, or absent himself without leave, any justice of the peace within the United States may, upon the complaint of the master, issue his warrant to apprehend the deserter and bring him before him, and if it shall then appear that he had signed the contract and that the voyage is not finished, altered, or the contract otherwise dissolved, the justice shall commit him to the house of correction or common jail of the town, there to remain until the vessel is ready to sail, or the master requires his discharge, etc. The Act of 1842, ch. 188, § 1, 5 U. S. Stats. at Large, 516, extended somewhat the powers above set forth to United States commissioners. It has been held, that justices of the peace alone have the power to try and commit deserting seamen and that commissioners of the United States can only arrest and commit them for trial. Ex parte Crandall, 2 Calif. 144.

[6] Bray *v.* Ship Atalanta, Bee, Adm. 48; Brower *v.* The Maiden, Gilpin, 294; Sherwood *v.* McIntosh, Ware, 109, 118. See also, cases ante, p. 466, note 2.

[7] Malone *v.* Brig Mary, 1 Pet. Adm. 139.

[8] Act of 1790, ch. 29, § 7. If the voyage is broken up by a disaster, while he is imprisoned, he must be discharged. Sims *v.* Sundry Mariners, 2 Pet. Adm. 393; Bray *v.*

and all his property on board the ship, unless he is received again on board, and he is liable to pay all damages and costs sustained by the owner in hiring another seaman in his place.[1]

By this statute, desertion seems to be defined as an "absence from the ship for more than forty-eight hours without leave."[2]

Ship Atalanta, Bee, Adm. 48. The Act of 1829, ch. 41, 4 U. S. Stats. at Large, 359, provides for the apprehension and delivery of deserters from foreign vessels. See In re Bruni, 1 Barb. 187.

[1] The fifth section of the Act of 1790, ch. 29, § 5, 1 U. S. Stats. at Large, 133, provided that if the seaman absented himself without permission, and the specified entry was made thereof in the log-book, if he should return to duty within forty-eight hours, he should forfeit three days' pay for every day he was absent, but if he should be absent for a longer time he should forfeit all the wages due, all his property on board, or lodged in any store at the time of the desertion, to the use of the owners of the ship, and should pay them all damages they might sustain by being obliged to hire other seamen in his place. This has been materially changed by the twenty-fifth section of the Act of 1856, ch. 127, 11 U. S. Stats. at Large, 62, which provides that in case of desertion in a foreign country, the fact and the date thereof shall be noted by the master or commander on the list of the crew, and the same shall be officially authenticated at the first port or place of consulate or commercial agency visited after such desertion, and if there shall be no port visited where there is such an agency, or if the desertion occurred in this country, the fact and time of such desertion shall be officially authenticated before a notary-public immediately at the first port or place where such vessel shall arrive after such desertion. The wages of the seaman, and his interest in the cargo if any, are forfeited to the use of the United States, and are to be paid over to the collector of the port where the crew are to be accounted for. The owners of the vessel may deduct any expenses they have necessarily incurred in consequence of such desertion, and money actually paid, or goods at a fair price supplied, or expenses incurred to, or for such seaman. By the general maritime law desertion is a forfeiture of wages. Ord. Wisbuy, art. 61; Hanse Towns, art. 53; 2 Molloy, ch. 3, § 10; Cloutman *v.* Tunison, 1 Sumner, 373; Coffin *v.* Jenkins, 3 Story, 108; The Rovena, Ware, 309; Spencer *v.* Eustis, 21 Maine, 519; The Brig Oseeola, Olcott, Adm. 450, 461; The Brig Cadmus *v.* Matthews, 2 Paine, C. C. 229; The Baltic Merchant, Edw. Adm. 86; The Pearl, 5 Rob. Adm. 224. But the court is not obliged to pronounce an entire forfeiture in all cases, but may take into consideration palliating circumstances not amounting to an excuse. Gifford *v.* Kolloch, U. S. D. C., Mass., 19 Law Reporter, 21.

If a minor is shipped on a whaling voyage by his father, and, after serving several years, deserts after having become of age, the father is entitled to his wages earned during his minority. Coffin *v.* Shaw, U. S. D. C., Mass., 19 Law Reporter, 146. So the minor, if he ships after the death of his father, may avoid the contract by deserting, and recover on a *quantum meruit*. Vent *v.* Osgood, 19 Pick. 572. And if he ships during the lifetime of his father, and then deserts, his father may recover for his services prior to the desertion. Bishop *v.* Shepherd, 23 Pick. 492.

If there be a series of voyages, wages earned in one will not be forfeited by a desertion in a subsequent voyage. Piehl *v.* Balchen, Olcott, Adm. 24.

[2] Act of 1790, ch. 29, § 5. An important question has arisen in regard to the construction of this act. On the one hand it has been held, that as the statute defines the offence of desertion, and provides the method by which it is to be proved, there can be

And there must be an exact entry of the fact on the log-book setting forth the circumstances, made on the day when the absence begins;[1] and it must be a continued absence for forty-eight suc-

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no forfeiture of wages by the maritime law. This was the view taken by the District Court for the Southern District of New York in numerous cases. See The Cadmus, Blatchf. & H. Adm. 139; The Martha, id. 151; The Elizabeth Frith, id. 195; The Union, id. 545, 555. The same view seems to have been taken in the Eastern District of Pennsylvania. See Wood *v.* The Nimrod, Gilpin, 83; Snell *v.* The Independence, id. 140; Knagg *v.* Goldsmith, id. 207. See also, The Schooner Phœbe *v.* Dignum, 1 Wash. C. C. 48; Brig Betsey *v.* Duncan, 2 Wash. C. C. 272; Herron *v.* Schooner Peggy, Bee, Adm. 57. On the other hand Mr. Justice *Story*, in Cloutman *v.* Tunison, 1 Sumner, 373, 380, speaking of this act, said: "But, inasmuch as such prolonged absence might endanger the safety of the ship, or the due progress of the voyage, it deems forty-eight hours' absence without leave, to be *ipso facto* a desertion, and inflicts upon it a total forfeiture of wages. It thus creates a statute desertion, and makes that conclusive evidence of the fact, which would, upon the common principles of the maritime law, be merely presumptive evidence of it. It does not supersede the general doctrine of the maritime law, or repeal it; but merely in a given case applies a particular rule *in pœnam*, leaving the maritime law in all other cases in full efficiency." Although these remarks are to a great extent *obiter*, there being neither maritime nor statutable desertion in that case, yet the doctrine therein contained was fully sustained by the same learned judge in a subsequent case, Coffin *v.* Jenkins, 3 Story, 108, and it may now be considered as the settled construction. See The Brig Cadmus *v.* Matthews, 2 Paine, C. C. 229; Barton *v.* Salter, U. S. C. C., Mass., 21 Law Reporter, 148; Ship Union *v.* Jansen, 2 Paine, C. C. 277; The Rovena, Ware, 309; The Brig Osceola, Olcott, Adm. 450, 461. If a seaman remains on shore more than forty-eight hours without leave, seeking redress before a public tribunal for an assault committed on board the vessel, it would seem that he could not be treated as a deserter. Sherwood *v.* McIntosh, Ware, 109.

[1] Act of 1790, ch. 29, § 5, 1 U. S. Stats. at Large, 100. In Cloutman *v.* Tunison, 1 Sumner, 373, 381, Mr. Justice *Story* said: "To work the statute forfeiture, it is made an indispensable condition that the mate, or other officer having charge of the log-book, should make an entry therein of the name of such seaman, on the day on which he shall so absent himself; and the entry must not merely state his absence, but that he is absent without leave. The entry on the very day is, therefore, a *sine quâ non*." See also, Spencer *v.* Eustis, 21 Maine, 119; The Schooner Phœbe *v.* Dignum, 1 Wash. C. C. 48; Brig Betsey *v.* Duncan, 2 id. 272; The Brig Cadmus *v.* Matthews, 2 Paine, C. C. 229; The Rovena, Ware, 309, 312; Lord *v.* Kimball, Sup. Jud. Ct., Mass., 1804, Abbott on Shipping, 648, n.; The Cadmus, Blatchf. & H. Adm. 139; The Martha, id. 151; The Union, id. 545; Wood *v.* The Nimrod, Gilpin, 83; Snell *v.* The Independence, id. 140; Knagg *v.* Goldsmith, id. 207; Magee *v.* The Moss, id. 219; Hunt *v.* The Brig Otis, Crabbe, 52; Bray *v.* Ship Atalanta, Bee, Adm. 48; Herron *v.* Sch. Peggy, id. 57. In Ulary *v.* The Ship Washington, Crabbe, 204, the entry in the log-book on the day the men left was "they ran away," and on subsequent days, "absent without leave." Held, that the latter entries were explanatory of the first, and sufficient. But see The Rovena, Ware, 309, 313. The entry is necessary although the absence is permanent. Knagg *v.* Goldsmith, *supra*. The entry in the log is not conclusive, and parol is admissible to falsify it. Malone *v.* The Brig Mary, 1 Pet. Adm.

cessive hours.[1] But where the absence, without leave, and without good cause, does not come within the terms of this definition, it is undoubtedly still an offence, punishable as such, and makes the seaman responsible in damages for the consequences.[2] It seems, however, that if the desertion takes place before the vessel is moored on her arrival at the end of the voyage, it is a statute desertion, working a forfeiture ;[3] but if it occurs

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139, 140; Whitton *v.* The Brig Commerce, id. 160; Jones *v.* The Brig Phœnix, id. 201; Thompson *v.* The Ship Philadelphia, id. 210; The Rovena, Ware, 309, 312; Orne *v.* Townsend, 4 Mason, 541. The question has arisen, in the case where a seaman goes on shore without leave, and the ship sails before the expiration of the forty-eight hours, whether this amounts to a statute desertion, he being unable to return to the ship. Mr. Justice *Story*, in Coffin *v.* Jenkins, 3 Story, 108, 113, speaking of this, said: "In short, the argument went to this, that it was not a desertion at all, either by the maritime law or under the statute, unless at the time of the seaman's leaving, he left it with the intent absolutely to desert, or *animo non revertendi*. To this doctrine I cannot, in any manner, subscribe. I understand the statute to declare, that an absence from on board the ship without leave, is a forfeiture of his wages, and a desertion, unless he actually rejoins the ship within forty-eight hours; and that it is at his own peril, under such circumstances, to absent himself; and if he is unable to rejoin the ship within the forty-eight hours, the forfeiture is complete and absolute. The ship is not bound to wait for him; but he is bound to rejoin the ship within that period, *suo periculo*." This language would clearly seem to embrace the case of a seaman leaving the ship without leave, but with no intention of deserting. To this extent the remarks are *obiter*, for in Coffin *v.* Jenkins, the seaman left *animo non revertendi*. In The Union, Blatchf. & H. Adm. 545, 559, Mr. Justice *Betts* held, that where the seamen left, intending to return, if the ship sailed before the expiration of forty-eight hours, their wages were not forfeited. But this ruling was reversed on appeal, Ship Union *v.* Jansen, 2 Paine, C. C. 277. If the return is prevented by the act of the captain, they are entitled to their wages. The Westmorland, 1 W. Rob. 216. If seamen, who are absent without leave, attempt to return to the ship at night without saying who they are, or what they want, this is not a return, which will remit the forfeiture. Ulary *v.* The Ship Washington, Crabbe, 204. See also, Allen *v.* Hallet, Abbott, Adm. 573. So, if they return, but refuse to do duty. The return must be unconditional. The Brig Cadmus *v.* Matthews, 2 Paine, C. C. 229. See also, The Ship Philadelphia, Olcott, Adm. 216.

[1] The Rovena, Ware, 309, 313; The Cadmus, Blatchf. & H. Adm. 139; Borden *v.* Hiern, id. 293.

[2] In Cloutman *v.* Tunison, 1 Sumner, 373, a desertion was not proved, but the second mate was absent without permission during the unlivery of the ship, and a forfeiture of two months' wages was decreed. See also, The Rovena, Ware, 309, 317; Snell *v.* The Brig Independence, Gilpin, 140; Knagg *v.* Goldsmith, id. 207, 217; Lang *v.* Holbrook, Crabbe, 179; The Ship Philadelphia, Olcott, Adm. 216; Herron *v.* Schooner Peggy, Bee, Adm. 57; The Martha, Blatchf. & H. Adm. 151; Jansen *v.* The Heinrich, Crabbe, 226. In Turner's Case, Ware, 83, it was held that the master might retake the person so leaving and confine him on board, although it was in a home port.

[3] The Pearl, 5 Rob. Adm. 224; The Baltic Merchant, Edw. Adm. 86.

after she is moored, and before the full unlivery of the cargo or the discharge of the crew, it is not a desertion under the law-merchant,[1] but gives to the ship-owner his claim for compensation in damages.[2] A desertion of a part of the crew does not exonerate the remainder from their obligation to perform their duties, although it may make these duties more onerous.[3]

SECTION IX.

OF THE CONTRACT OF THE SEAMEN.

We would add the general remark, that the contract between a seaman and the owner of the ship, or the master as his agent, is essentially a contract of hiring and service. All that is implied in such contracts by the law generally belongs to their contract;[4] as, on the one hand, the doing the work faithfully, obeying all proper orders and directions, and possessing and exerting the knowledge, skill, and care requisite for doing in a proper way the service undertaken; and, on the other, good treatment, and due payment. All of these are somewhat modified by the peculiar nature of this contract, or relation, and by the statutes to which it has given rise. But so far as these modifications or qualifications do not apply specifically, we find the general principles of the law in force.

Seamen may be hired and payment promised in four ways. They may be employed for a certain voyage, to receive a certain

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[1] Hastings *v.* The Ship Happy Return, 1 Pet. Adm. 253; Cloutman *v.* Tunison, 1 Sumner, 373; The Ship Elizabeth *v.* Rickers, 2 Paine, C. C. 291; The Martha, Blatchf. & H. Adm. 151, 157; Granon *v.* Hartshorne, id. 454; Knagg *v.* Goldsmith, Gilpin, 207; Jansen *v.* The Heinrich, Crabbe, 226; Herron *v.* Schooner Peggy, Bee, Adm. 57. See also, Frontine *v.* Frost, 3 B. & P. 302; M'Donald *v.* Joplin, 4 M. & W. 284; The Two Sisters, 2 W. Rob. 125. See *contra*, Webb *v.* Duckingfield, 13 Johns. 390.

[2] See cases supra, p. 475, note 2.

[3] See ante, p. 448, note 1.

[4] The Dawn, Ware, 486, 494; The Brig Osceola, Olcott, Adm. 450, 461; The Cadmus, Blatchf. & H. Adm. 139; Matthews *v.* The Cadmus, 2 Paine, C. C. 229.

proportion of the freight earned ;[1] but we doubt whether this is ever practised in this country, unless, perhaps, in small coasting vessels. They may be hired for a certain voyage,[2] or by the run, to be paid a round sum at the close ;[3] and this is not very unusual. They may be hired on shares, which is in practice confined to whaling[4] and fishing voyages,[5] with some exception in the case of coasting vessels.[6] But the fourth, which is by far the most common and well-established practice, is to hire them for a definite voyage or voyages, or sometimes for a definite period, on monthly wages.[7]

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[1] The Sarah Jane, Blatchf. & H. Adm. 401 ; Anonymous, 1 Pet. Adm. 205, note.

[2] The Debreesia, 3 W. Rob. 33.

[3] The Louisa Bertha, 1 Eng. L. & Eq. 665 ; Miller *v.* Kelly, Abbott, Adm. 564.

[4] Barney *v.* Coffin, 3 Pick. 115 ; Bishop *v.* Shepherd, 23 Pick. 492 ; Coffin *v.* Jenkins, 3 Story, 108 ; Joy *v.* Allen, 2 Woodb. & M. 303 ; Allen *v.* Hitch, 2 Curtis, C. C. 147 ; The Sarah Jane, Blatchf. & H. Adm. 401 ; Reed *v.* Hussey, id. 525. The contract is one of hiring, and not of partnership. Wilkinson *v.* Frasier, 4 Esp. 182 ; Mair *v.* Glennie, 4 M. & S. 240 ; The Frederick, 5 Rob. Adm. 8 ; Baxter *v.* Rodman, 3 Pick. 435 ; Grozier *v.* Atwood, 4 id. 234 ; Bishop *v.* Shepherd, 23 id. 492 ; Reed *v.* Hussey, Blatchf. & H. Adm. 525 ; Knight *v.* Parsons, U. S. D. C., Mass., 18 Law Reporter, 96. In the above case of Barney *v.* Coffin, it was held that a usage that the master of a whaling ship should have a lien on the lays of the seamen for necessary clothing furnished during the voyage was reasonable in its nature, and that the lien was not lost by putting the oil marked with the ship's mark on a wharf, whence part of it was taken by one of the owners of the vessel but afterwards returned and delivered up to a general agent to be sold for the purpose of settling the voyage. In Jay *v.* Almy, 1 Woodb. & M. 262, it was held that the master of a whaling ship is not personally responsible for the wages of a seaman, when the vessel has been lost, and the cargo sent home. In Hussey *v.* Fields, U. S. D. C., Mass., 20 Law Reporter, 673, eight hundred barrels of oil had been sent home, and two thousand more taken when the ship put into a foreign port and was condemned and sold. The master settled with the men for their share on board and gave them orders on the owners for their proportion of the eight hundred barrels. The other portion was handed over to the consul to be sent home, when it was illegally seized and sold. The owners claimed, that as the crew were only entitled to share the net profits of the voyage, the portion they had received should be debited to them as against the whole amount of oil realized by the voyage. But the court held, that the captain, in making the disposition of the property, acted as the agent of the owners and not of the crew, and that the latter were entitled to their proportion of the eight hundred barrels.

[5] See Wait *v.* Gibbs, 4 Pick. 298.

[6] The Crusader, Ware, 437, 441.

[7] The Brig Cadmus *v.* Matthews, 2 Paine, C. C. 229 ; The Cadmus, Blatchf. & H. Adm. 139. See also, The Steamboat Hudson, Olcott, Adm. 396. It is sometimes important to determine whether the contract is for the entire voyage at so much per month, or for that rate so long as the party remains during the voyage. In Taylor *v.* Laird, 1 H. & N. 266, 38 Eng. L. & Eq. 281, the following letter was written to the

If a female serves on board as a cook, or in any capacity, she is entitled to all the rights and is subject to all the disabilities of a seaman.[1]

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plaintiff by the owner of the vessel: "I am willing to give you the command of the steamer destined for an exploring and trading voyage up the River Niger and its tributaries. Your pay to be at the rate of £50 per month, commencing from the first of December, 1853, and a commission of twenty per cent. on the net proceeds of the produce you may bring down." The plaintiff accepted the offer. Held, that this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, and which, when once vested, was not subject to be lost, or divested by the plaintiff's abandonment of the voyage.

[1] The Jane and Matilda, 1 Hagg. Adm. 187; Wolverton *v.* Lacey, U. S. D. C., Ohio, 18 Law Reporter, 672; Sageman *v.* Sch. Brandywine, 1 Newb. Adm. 5.

CHAPTER XIII.

OF PILOTS.

SECTION I.

WHO PILOTS ARE AND WHAT THEIR DUTIES ARE.

This word had formerly, and now has, perhaps, in some of the countries of Europe, two meanings; one was the pilot for the whole voyage, or the sea-pilot,[1] the other is the pilot who carried the ship out of or into the harbor to which the pilot belonged, or the coast-pilot. But it is only in the latter sense that the word is used with us. He is for many purposes considered as a mariner or seaman;[2] but has duties and rights which are quite peculiar to him. The office is one of so much importance, that it is regulated by law in most civilized countries. In this country, an act of Congress[3] expressly authorizes the several States to make their own pilotage laws; and questions under these laws are cognizable in the State courts.[4] The State statutes

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[1] L'Ord. de la Marine, liv. 2, tit. 4. See also, Keeler *v.* Fireman's Ins. Co. 3 Hill, 250.

[2] Ross *v.* Walker, 2 G. Wilson, 264; The Anne, 1 Mason, 508; Hobart *v.* Drogan, 10 Pet. 108.

[3] Act of 1789, ch. ix. § 4, 1 U. S. Stats. at Large, 54. See Appendix, post. By the Act of 1837, ch. xxii., 5 U. S. Stats. at Large, 153, the master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ a pilot duly licensed by either State.

[4] In The Wave, Blatchf. & H. Adm. 235, it was held that the United States courts had concurrent jurisdiction with the State courts to entertain suits for pilotage. On appeal the decision was reversed, on the ground that the act of Congress which adopted the State laws, was passed prior to the passage of the Judiciary Act, and that cases of pilotage were therefore not embraced in the general delegation of admiralty jurisdiction to the district courts. Schooner Wave *v.* Hyer, 2 Paine, C. C. 131. See also, *Marshall*, C. J., in Gibbons *v.* Ogden, 9 Wheat. 1, 207; Low *v.* Commissioners of Pilot-

differ somewhat; but we give in the Appendix the principal provisions enacted by pilot commissioners in pursuance of the power given them by the statutes of New York and Massachusetts, to one or other of which those of the other States generally conform.[1] It will be seen that no persons can act as such, but those who are regularly commissioned.

It is true that any person may undertake to guide his own or another's vessel anywhere; but he cannot claim the compensation allowed by law for this service unless he be duly appointed; nor can he claim any compensation for the service if he falsely pretended to have a commission, or as it is technically termed, a branch, and obtains the direction of the ship by this pretence; but he is liable not only civilly in damages, but criminally for any losses or injuries resulting from his falsehood. Every pilot

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age, R. M. Charlt. 302, 314. But in Hobart *v.* Drogan, 10 Pet. 108, Mr. Justice *Story* held that the United States courts had a concurrent jurisdiction with the State courts, although the pilot's compensation was established by the law of the State in which the action was brought. See also, The Anne, 1 Mason, 508; Dexter *v.* Bark Richmond, U. S. D. C., Mass., 4 Law Reporter, 20. The State laws are entitled to a liberal construction, as they are especially designed to promote the interests of commerce, and to protect the lives and property of the citizens engaged in it. Smith *v.* Swift, 8 Met. 332. The law of 1789, provides that pilots shall be governed by the existing laws of the States, and also by future laws, "until further legislative provision shall be made by congress." Since this act was passed the several States have enacted new laws, or modified the old laws to a great extent. If the power to regulate commerce belongs exclusively to Congress by the Constitution, Congress has no power to delegate that power to the several States, though it may adopt the acts which they have already passed, and they then become of force. But they are then acts of Congress and cannot be changed by the States, unless Congress has the power to adopt prospectively subsequent State laws. But *Marshall*, C. J., in Gibbons *v.* Ogden, 9 Wheat. 1, 218, declared that Congress cannot enable a State to legislate. We are therefore driven to the alternative, that either all the pilot acts passed by the several States since 1789, are void, or that the States have concurrent jurisdiction over the subject. And this latter view has been adopted by the Supreme Court of the United States in the case of Cooley *v.* The Board of Wardens of the Port of Philadelphia, 12 How. 299. Mr. Justice *Curtis*, in delivering the opinion of the court, said: "It is the opinion of the majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of the power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined." Mr. Justice *Wayne* delivered a very able dissenting opinion, which is worthy of an attentive perusal.

[1] For decisions under the State statutes, see Tilley *v.* Farrow, 14 Mass. 17; Ayers *v.* Knox, 7 Mass. 306; Shepherd *v.* Mitchell, 10 Johns. 112; Heridia *v.* Ayres, 12 Pick. 334; Hunt *v.* Card, 14 Pick. 135; and cases *infra*.

should always have with him the evidence of his authority; for this designates the kind of vessel he may undertake to pilot.[1] Of course it is easy to pilot a vessel in proportion as she draws less water, and difficult as she draws more. Therefore those who have been in the service but a certain time, can pilot only the lightest vessels, up to a certain limit; as they have more experience and skill, they are authorized to take charge of larger vessels; and their authority increases with their experience according to defined and established rules, until they may pilot vessels of any size.

No vessel is bound to take on board a pilot, either going in or coming out of a harbor; but if a pilot offers and is ready, the ship must pay pilotage fees, whether he is taken on board or not.[2] If the pilot refuses to direct the course of the vessel for good reasons, or because the state of the tide or of the wind or weather would endanger the ship if she attempted egress or ingress, but offers to wait until she can move in safety, and then pilot her, we should hold this not as a refusal, but as an offer on the part of the pilot, and therefore as entitling him to claim the fees.

It is not necessary, to constitute "a valid offer of his services," that the pilot should go on board, and tender them to the master. If he hail the vessel when the pilot boat is so near, and in such a position that the hail was heard on board the ship, or might have been, if the officers and crew had been on duty, this is sufficient.[3]

In some of our ports the pilots form a kind of association, and take the duty of going out with a ship or lying out in the

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[1] Hammond *v.* Blake, 10 B. & C. 424; Commonwealth *v.* Ricketson, 5 Met. 412, 426.

[2] Nickerson *v.* Mason, 13 Wend. 64; Commonwealth *v.* Ricketson, 5 Met. 412; Smith *v.* Swift, 8 id. 329; Martin *v.* Hilton, 9 id. 371; Hunt *v.* Mickey, 12 id. 346; Hunt *v.* Carlisle, 1 Gray, 257; Gerrish *v.* Johnson, 1 N. C. Law, 335; Beckwith *v.* Baldwin, 12 Ala. 720. But if he offers himself and is refused, he cannot maintain an action for work and labor done. Donaldson *v.* Fuller, 3 S. & R. 505. See also the remarks of *Shaw*, C. J., in Winslow *v.* Prince, 6 Cush. 368, 370. The master is bound to approach the pilot ground carefully, and if in the night, he must hold out a light, and wait a reasonable time for a pilot, and approach one if he can do so with safety. Bolton *v.* American Ins. Co., 3 Kent's Comm. 176, n. (a).

[3] Commonwealth *v.* Ricketson, *supra*. But see Peake *v.* Carrington, 2 Brod. & B. 399.

offing for one, by turns. In others, each pilot gets what he can; and in such ports the pilots, as might be expected, are, if not more alert, more adventurous, and go further out to sea to board the incoming vessels. It is said to be common for New York pilots to meet ships approaching our coast, at one or two hundred miles distant; and the question has arisen whether they have at once the same authority, and rights and responsibility, as when they are near or entering their harbors. We know of no adjudication on this subject; but do not believe that the courts will recognize as a *coast-pilot*, one who is so far from the land, that he can discharge no duties but as *sea-pilot*, or able seaman. Some of our coasting steamers carry a pilot with them. Thus, for example, the steam-packets between Boston and Philadelphia have on board a pilot, who has no duties to perform until the vessel is near the Delaware river.

While a pilot is on board (unless, with the exception arising from extreme distance), he has the absolute and exclusive control in the absence of the master, nor is the master liable for any accident which may then happen.[1] How it is when the master is present may not be so certain. So far, however, as we can gather the law from books or from practice, we should say that the pilot has the control of the ship as soon as he stands on the deck.[2] But no such absolute control is wholly to supersede the master; for it remains in the master's power, and it is his duty, to observe the pilot, and in a case of obvious and certain

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[1] Snell *v.* Rich, 1 Johns. 305.

[2] In Aldrich *v.* Simmons, 1 Stark. 214, an action of case was brought against the owner of a vessel for the negligence of the pilot who was employed both by the owner and by the master. The pilot was called as a witness for the defendant who had released him. It was objected that the master should also have given a release. But *Gibbs*, C. J., held that he was competent without a release, since the captain could not be responsible to the owner for the misconduct of the pilot. Bowcher *v.* Noidstrom, 1 Taunt. 568, was a case where an action was brought against the master, not for the negligent act of the pilot, but for a wilful injury on his part, and it was held that the master was not liable. There is also a *dictum* to the effect that a master is not liable in Yates *v.* Brown, 8 Pick. 24, per *Parker*, C. J. But in Denison *v.* Seymour, 9 Wend. 9, where an action was brought against the master of a steamboat for damage caused by a collision, and it was proved that at the time the master was on board but not on deck, and that the pilot was chosen by the owners, and at the time was at the wheel, and had the exclusive command of the vessel, the master was held liable. See also, United States *v.* Forbes, Crabbe, 558; United States *v.* Lynch, 2 N. Y. Legal Observer, 51.

disability, or dangerous ignorance or mistake, to disobey him and dispossess him of his authority.[1] And although a master,

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[1] The question of the respective rights and duties of the pilot and master, has come up in several recent cases in England, in regard to the liability of owners of vessels for torts or acts of negligence of the pilot, it being held, under their pilots acts, as we shall presently see, that if the injury is occasioned by the negligence of the pilot alone, the owners are not responsible, but otherwise if there is negligence in the master, either in acts of commission or omission. In The Girolamo, 3 Hagg. Adm. 169, 176, the collision arose from the vessel's going on in a fog, and it was argued that the master was *in pari delicto* from not having interposed and brought the vessel up. Sir John *Nicholl* expressed a strong opinion in favor of this view, but left the point undetermined. In The Lochlibo, 3 W. Rob. 310, 1 Eng. L. & Eq. 651, it was held that it was solely the duty of the pilot to determine when the vessel should be brought up; and on appeal this decision was affirmed. Pollok *v.* McAlpin, 7 Moore, P. C. 427. The court said: "It was contended at the bar that, in this case, the impropriety of sailing through the Downs was so manifest, that the captain ought to have refused in spite of the pilot's opinion. But we cannot assent to this. It would be very dangerous to hold, that there can be any divided authority in the ship with reference to the same subject, and whether the ship was to anchor or to proceed, was a matter which we think belonged exclusively to the pilot to decide." See also, The Maria, 1 W. Rob. 95. It is the duty of the pilot to select the time and place of coming to anchor. The George, 2 W. Rob. 386; The Massachusetts, 1 W. Rob. 371. So when a vessel is taking her berth, the time and manner of dropping the anchor are exclusively within the province of the pilot. The Agricola, 2 W. Rob. 10. And the manner of catting it, preparatory to bringing up for the purpose of taking a berth is within the province of the pilot. The Gipsey King, 2 W. Rob. 537. But in Griswold *v.* Sharpe, 2 Calif. 17, it was held, that it was the duty of the master or harbor master to select a proper berth, and not the pilot's. But it is provided by statute that the pilot shall moor the ship safely where the master of the vessel, or the harbor master direct. Compiled Laws of Cal., ch. viii. § 24. In The Diana, 1 W. Rob. 131, affirmed, Stuart *v.* Isemonger, 4 Moore, P. C. 11, it was held to be the duty of the master to see that a good look-out was kept, although a pilot was on board. The court said: "Although the directions of the pilot may be imperative upon them" (the master and crew), "as to the course the vessel is to pursue, the management of the ship is still under the control of the master." s. p. Netherlands S. B. Co. *v.* Styles, Privy Council, 40 Eng. L. & Eq. 19. If two vessels are entangled together, and they can be separated by cutting away part of the rigging, it is the duty of the master to give orders about it. The Massachusetts, 1 W. Rob. 371. And in The Christiana, 7 Notes of Cases, 2, affirmed Hammond *v.* Rogers, 7 Moore, P. C. 160, it was held to be the duty of the master to have the top-gallant and main royal yards sent down when this was necessary. When the pilot is remiss in his duty, it is difficult to determine with precision to what extent the master is bound to interfere. In the case of The Maria, 1 W. Rob. 95, 110, Dr. *Lushington* said: "It would be a most dangerous doctrine to hold, except under most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owners, which are now protected both by the general principles of law, and specific enactments from liability for the acts of the pilot, would be most severely prejudiced." In Netherlands Steamboat Co. *v.* Styles 40 Eng. L. & Eq. 19, a case where, in consequence of a defective look-out, a barge

if present, is not answerable for any ordinary accident or injury arising from the pilot's default, he would be answerable if it arose from such act or default on the pilot's part, as, within the rule just stated, made it the master's duty to repossess himself of the control and direction of the ship.

SECTION II.

HOW FAR OWNERS ARE RESPONSIBLE FOR THE TORTS OF PILOTS.

The pilot is the servant of the owner. And if the owner is not obliged to take a pilot, the law only securing to him, and appointing a sufficient pilot if he wishes one, it follows that the owner is responsible for injuries resulting from the default of the pilot.[1] In England it is provided by statute that no owner or

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was sunk by a swell caused by the steamer, the court said that if the look-out had informed the pilot, of the barge, and he had insisted on going on, the owners would have been discharged. See also, Pollok *v.* McAlpin, *supra;* The Christina, 3 W. Rob. 27. But, "it is the duty of the master to observe the conduct of the pilot, and in the case of palpable incompetency, whether arising from intoxication, or ignorance, or any other cause, to interpose his authority for the preservation of the property of his employers." The Duke of Manchester, 2 W. Rob. 470, 480. Affirmed on appeal. Shersby *v.* Hibbert, 6 Moore, P. C. 90. See also, The Christiana, 7 Notes of Cases, 2; Hammond *v.* Rogers, 7 Moore, P.C. 160; The Joseph Harvey, 1 Rob. Adm. 306, 311. If the pilot goes below for a few minutes, leaving the second mate in command, with general directions how to steer, and a collision occurs partly through the fault of this officer, the ship is responsible. The Mobile, Privy Council, 20 Law Reporter, 172. In The Lochlibo, 3 W. Rob. 329, 1 Eng. L. & Eq. 651, 656, it was held that if there was a hail from the look-out to alter the helm, and the pilot altered it without exercising his own judgment, the owners of the vessel would be liable. Speaking of interference on the part of the master or crew, Dr. *Lushington* said: "I should never go the length of saying that the mere suggesting to the pilot on the part of the master to take in this sail, or otherwise to keep as near the South Sand light, and *vice versâ*, or to bring the ship up, was interfering, in the legal acceptation of the term, with the duties of the pilot; illegal interference is of a different description. If, for example, in this case the boatswain had called out to the men below to starboard the helm, or if the master called out to port the helm, it would be interference, but it would not be interference to consult the pilot, or to suggest to him that the measures pursued were not proper, or that other measures would in all probability be attended with greater success."

[1] The Attorney-General *v.* Case, 3 Price, 302; The Neptune, 1 Dods. 467; The

master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons, by reason of any neglect, default, incompetency, or incapacity of any licensed pilot in charge of the vessel in pursuance of the provisions of the act.[1] It was formerly held, under this statute, that if there was a pilot on board, and there was a neglect in the navigation of the vessel, it was *primâ facie* attributable to him.[2] But the rule is now well established, that as the owners claim an exemption from a general liability by reason of a special legislative enactment, the burden is on them to show in order to bring themselves within the provisions of the enactment, that the pilot was alone in fault.[3] The eighty-ninth section

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Transit, cited 1 W. Rob. 50; The Eden, 2 W. Rob. 442; Yates *v.* Brown, § Pick. 23; Bussy *v.* Donaldson, 4 Dall. 206; Williamson *v.* Price, 16 Mart. La. 399; Pilot Boat Washington *v.* The Saluda, U. S. D. C., S. Car., April, 1831; The Bark Lotty, Olcott, Adm. 329; Smith *v.* The Creole, 2 Wallace, C. C. 485; The Carolus, 2 Curtis, C. C. 69. In this case the vessel was going out of the harbor with a pilot on board who was employed by the owner of the vessel, and the vessel was held liable. Mr. Justice *Curtis* said: "If the pilot in charge of this ship had not been selected and employed by the owner, but had been received by the master in obedience to a requisition of law, enforced by a penalty, then, under the authority of Carruthers *v.* Sydebotham, 4 M. & S. 77; The Maria, 1 W. Rob. 95; and The Agricola, 2 id. 10, the owners would seem not to be liable for the misconduct or mismanagement of the pilot. But in this instance the pilot has testified that he was employed by the owner of the ship; and no such case is made by the answer as would compel an owner to receive a pilot on board under the statute laws of Massachusetts."

[1] 6 Geo. 4, c. 125, § 55. In England it is well settled that if the pilot is alone in fault the owners are not liable. Bennet *v.* Moita, 7 Taunt. 258; Ritchie *v.* Bowsfield, id. 309; M'Intosh *v.* Slade, 6 B. & C. 657; The Christiana, 2 Hagg. Adm. 183; The Protector, 1 W. Rob. 45; The Maria, id. 95; The Duke of Sussex, id. 270; The Vernon, id. 316; The Agricola, 2 W. Rob. 10; The Fama, id. 184; The George, id. 386; The Batavier, id. 407; The Atlas, id. 502; The Gipsey King, id. 537.

[2] Bennet *v.* Moita, 7 Taunt. 258; The Christiana, 2 Hagg. Adm. 183; The Vernon, 1 W. Rob. 316.

[3] The Protector, 1 W. Rob. 45; The Diana, 1 W. Rob. 131, affirmed Stuart *v.* Isemonger, 4 Moore, P. C. 11; The Ripon, 6 Notes of Cases, 245; The Christiana, 7 Notes of Cases, 2, affirmed Hammond *v.* Rogers, 7 Moore, P. C. 160. See also, The Massachusetts, 1 W. Rob. 371; Rodrigues *v.* Melhuish, 10 Exch. 110, 28 Eng. L. & Eq. 474; The Mobile, Privy Council, 20 Law Reporter, 172; Netherlands S. B. Co. *v.* Styles, Privy Council, 40 Eng. L. & Eq. 19. In The Batavier, 2 W. Rob. 407, the pilot had been in the constant employ of the owners for fifteen years, but as he was alone in fault the owners were held not liable. In The Christiana, *supra*, the pilot had done his duty by bringing the vessel to the Downs, where she anchored, but as he could not leave on account of bad weather the owners were held entitled to the legal protection which his presence gave them. See also, Lacey *v.* Ingram, 6 M. & W. 302. The 87th section of the 6 Geo. 4, c. 125, provided that nothing in the act contained

of this statute provides that the act shall not extend to ports in relation to which special provisions have been made in any particular act or acts of parliament. It would clearly seem that by this section the general act does not apply to the ports of Liverpool and Newcastle, and it has been so held.[1] The Liverpool and Newcastle acts contain no clause similar to that in the general statute of 6 Geo. 4, but provide merely, that a master shall take a pilot on board or shall pay pilotage. This is similar to our own statutes, and the question arises whether the pilot can be said to be taken on board by such compulsion that the owner is not liable for his acts. In England the weight of authority is clearly in favor of exonerating the owner.[2] But in this country the question does not seem to be fully determined.[3]

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should extend to, affect, or impair the jurisdiction of the High Court of Admiralty. Sir *John Nicholl* construed this to mean that the act only applied to the common law courts, and that the vessel was still liable *in rem* although there was a pilot on board. The Girolamo, 3 Hagg. Adm. 169. See also, The Baron Holberg, 3 Hagg. Adm. 244; The Gladiator, id. 340; The Eolides, id. 367; Smith *v.* The Creole, 2 Wallace, C. C. 485, 518. But it is now well settled in England that the clause above cited means that the Court of Admiralty shall retain its jurisdiction to administer the law as altered by the act, and therefore, the vessel is not liable if the pilot is alone in fault. The Protector, 1 W. Rob. 45, 52, and cases *supra*.

[1] Attorney-General *v.* Case, 3 Price, 302. The King's Bench, in Carruthers *v.* Sydebotham, 4 M. & S. 77, were of a different opinion. The Supreme Court of the United States, in a case of collision happening in the port of Liverpool between two American vessels, seemed to consider it settled by the English admiralty cases that the owners were not liable if there was a pilot on board. Smith *v.* Condry, 17 Pet. 20, 1 How. 28. It is to be observed, however, that the cases cited are The Maria, 1 W. Rob. 95; The Protector, id. 45; The Diana, id. 131. The last two cases were decided under the general act, and are, therefore, not authorities to the point that the 55th section applies to the Liverpool act. In The Maria, *supra*, which was a case under the Newcastle act, which is similar to the Liverpool, Dr. *Lushington* said he doubted very much whether he could apply the 55th section of the general act to the case of a Newcastle pilot. He expresses the same doubt also in the subsequent case of The Agricola, 2 W. Rob. 10.

[2] The Court of King's Bench, in Carruthers *v.* Sydebotham, 4 M. & S. 77, and the Court of Exchequer, in Attorney-General *v.* Case, 3 Price, 302, have arrived at opposite conclusions in regard to the construction of the Liverpool act. In the former case it was held, that the taking a pilot on board was compulsory, and the owners, therefore, were not liable. In the latter case a different opinion was expressed, but the facts of the case did not call for it. The vessel was lying at anchor in the river Mersey. By the 31st and 34th sections of the Liverpool act, it is provided, that any vessel, whilst lying at anchor, may require a pilot to remain on board upon payment of five

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[3] It would seem to have been the opinion of Mr. Justice *Curtis*, in the case of The Carolus, 2 Curtis, C. C. 69, cited ante, p. 484, note 1, that had the vessel been home-

If a ship neglects to take a pilot that offers, the owners will be answerable in damages to shippers or others, for any loss which may happen by reason of their neglect or refusal.[1] And pilots themselves are answerable like other persons for any harm which they may do, by negligence or default.[2]

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shillings a day for his services. The pilot was retained on board, and the owners were held liable. This case, therefore, is not an authority against the construction of the act, as laid down in Carruthers *v.* Sydebotham. See also, Rodrigues *v.* Melhuish, 10 Exch. 110, 28 Eng. L. & Eq. 474. It was held, in The Montreal, 24 Eng. L. & Eq. 580, where a pilot had been taken on board under the Liverpool act to pilot the vessel to the Queen's Docks at Liverpool, and had subsequently anchored in the river Mersey, and came into collision the next day while proceeding up the river, that the vessel was not liable, the pilot being alone to blame. And in The Maria, 1 W. Rob. 95, and The Agricola, 2 W. Rob. 10, cases under the Newcastle act, it was held, that if the master was obliged to take a pilot on board or to pay full pilotage, such a taking was by compulsion and the owners were not liable. In both these cases the vessels were homeward bound.

[1] See M'Millan *v.* Union Ins. Co., 1 Rice, 248; Keeler *v.* Fireman's Ins. Co., 3 Hill, 250. And in an English case, where a vessel, seized on justifiable grounds, as appeared by the condemnation of a part of her cargo, was lost by the neglect of the captors to take a pilot on board, the Court of Admiralty decreed restitution in value against them. The William, 6 Rob. Adm. 316. But if no pilot can be obtained, and the most judicious course is for the master to attempt to go into port without one, the owners will not be responsible for a loss happening in consequence of his so doing. Vansyckle *v.* The Sch. Thomas Ewing, U. S. D. C., Penn., 3 Law Reporter, 449.

[2] Yates *v.* Brown, 8 Pick. 24; Heridia *v.* Ayres, 12 id. 334; Campbell *v.* William-

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ward bound, so that the master would have been obliged to have taken the first pilot that offered, or have paid full pilotage, that the owners of the vessel would not have been liable for the collision. Let us see then whether this opinion is repugnant to the American authorities. In Yates *v.* Brown, 8 Pick. 23, the vessel was outward bound. In Bussy *v.* Donaldson, 4 Dall. 206, and in Williamson *v.* Price, 16 Mart. 399, it does not appear which way the vessels were going. In the case of The Bark Lotty, Olcott, Adm. 329, it was contended that the exemption from liability continued after the vessel was moored to the wharf by the pilot. But the court, very properly, decided otherwise. Smith *v.* The Creole, 2 Wallace, C. C. 485, was also a case of an outward bound vessel. This case was argued at great length, and a very learned opinion pronounced by Mr. Justice *Grier*, to the effect that the Pennsylvania act, which provides that every vessel shall be *obliged* to receive a pilot, or in default thereof, shall pay a sum equal to half pilotage, is not compulsory. Such also, is the opinion of Mr. Justice *Story;* Story on Agency, § 456 *a*, note 1. In Griswold *v.* Sharpe, 2 Calif. 17, it was said that when a vessel is properly in charge of a licensed pilot, the owner is not responsible for damages which may ensue for his negligence or misconduct. But in that case, the master being in fault, the owners were held liable. It will thus be seen that there is no *decision* in opposition to the suggestion thrown out by Mr. Justice *Curtis*, though it cannot be denied that the principles and reasonings upon which the authorities are based, are against it.

son, 2 Whart. Dig. 680. See also, Slade *v.* The State, 2 Carter, 33. In Lawson *v.* Dumlin, 9 C. B. 54, an action was brought against a pilot for negligently running into the ship of the plaintiff. The pilot, at the time, was in command of another vessel. He was held liable. In Stort *v.* Clements, Peake, 107, the general rule was admitted, but as the collision took place in consequence of the pilot steering the vessel according to the direction of the officer in charge, he was not held responsible. If a steamboat is hired for the purpose of towing a vessel, to which she is fastened, and both are under the direction of a licensed pilot, if the steamboat is injured in the course of the navigation, the owner of her is not entitled to damages, unless it was caused by the undue negligence of the pilot. Reeves *v.* The Ship Constitution, Gilpin, 579.

If a pilot refuses to board a vessel he is liable for damages civilly and criminally. Commissioners of Pilotage *v.* Low, R. M. Charlt. 298.

CHAPTER XIV.

OF MATERIAL MEN AND THEIR LIENS.

THE persons employed to repair the ship, or in general, to do any work about her, and those who furnish for her use supplies of things necessary to her equipment and safe navigation, are known in the law of shipping, as material men; they are defined in Jacobsen's Sea Laws as "the persons who furnish and construct the different materials of a ship;"[1] but a somewhat broader sense is usually given to this phrase, and Lord *Stowell*, in one case, cited a report of Sir Leoline Jenkins, made to the king, in which that learned judge said: "Those are commonly called material men, whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision necessary in any kind."[2] Those who build a ship or who furnish supplies to a ship that is building, are not, however, now considered as having a lien upon it by the maritime law, as will be seen presently. It has been held, that a ship broker who obtains a crew for a vessel has a lien on her for his services and for advances for their wages.[3] And a person who lends money for the use of a foreign ship has the same privilege as a material man.[4] But stevedores have no lien *in rem* for their services in loading a vessel.[5] Nor can they sue *in personam* for their services, in admiralty.[6] They may, however, proceed against

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[1] Page 357, note.

[2] The Neptune, 3 Hagg. Adm. 129, 142.

[3] The Gustavia, Blatchf. & H. Adm. 189.

[4] Davis *v.* Child, Davcis, 71. See also, The Sophie, 1 W. Rob. 368.

[5] The Amstel, Blatchf. & H. Adm. 215; The Bark Joseph Cunard, Olcott, Adm. 120; M'Dermott *v.* The S. G. Owens, 1 Wallace, Jr., 370.

[6] Cox *v.* Murray, Abbott, Adm. 340. The action in this case was to recover damages for the breach of an executory contract, no services having been actually performed. But the language of the court, both in this case and in those cited in the preceding note, fully sustains the position of the text.

remnants in the registry.[1] And a person employed to visit a vessel from time to time to see to her safety, ventilate her, and try her pumps, etc., cannot sue in the admiralty to recover compensation for his services, but he can maintain a suit if he navigates the vessel from one anchorage to another.[2] And a person hired to scrape the bottom of a vessel preparatory to her being coppered, cannot sue in admiralty.[3] So the expense of compressing a cargo for the purpose of more convenient stowage, the cost of advertising the vessel for sea, portage, commissions for procuring freight, and wages of lightermen, do not give a lien on the ship.[4] Nor has a ship broker any lien on the vessel for services in drawing a contract between the owner of horses shipped as part of the cargo, and persons who were to accompany the vessel and take charge of the horses, as hostlers.[5] And the general agent of the owners of a steamboat cannot sue in admiralty for the balance of an account for money expended in paying for supplies, repairs, and advertising of the boat, or for his commissions on the disbursements.[6]

That is deemed necessary which a careful and prudent owner would supply.[7]

By the general maritime law, and the civil law from which many of its provisions are derived, all material men have a lien

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[1] Emerson *v.* Proceeds of The Pandora, 1 Newb. Adm. 438.

[2] Gurney *v.* Crockett, Abbott, Adm. 490.

[3] Bradley *v.* Bolles, Abbott, Adm. 569.

[4] The Bark Joseph Cunard, Olcott, Adm. 120.

[5] The Gustavia, Blatchf. & H. Adm. 189.

[6] Minturn *v.* Maynard, 17 How. 477.

[7] The Alexander, 1 W. Rob. 346. We have seen that if a vessel belongs to one State and supplies are furnished in another, the master has no authority to give a bottomry bond. And it is said, in Pratt *v.* Reed, 19 How. 359, that the necessity which authorizes the master to impose a lien in the one case, differs from the necessity which authorizes the giving a bond, only in respect to the maritime interest. It has accordingly been held, in a recent case in New York, by *Betts*, J., that where a vessel is owned in New Jersey and supplies are furnished in New York, no lien is created by the maritime law. Beach *v.* Sch. Native, U. S. D. C., N. Y. In Sarchet *v.* The Sloop Davis, Crabbe, 185, a chain cable was loaned by its maker to a master for the use of his vessel, under an agreement that it should be returned when another chain cable had been made, and delivered on board. The second cable was made and delivered on board, when the master agreed to return the first in a specified time. Before this time arrived the vessel sailed, and the cable was never returned. The court held that the vessel was liable for both. Water casks are included in "materials." Zane *v.* The Brig President, 4 Wash. C. C. 453.

on the ship.[1] This was asserted also, and enforced in the admiralty courts in England, until they were compelled to abandon this jurisdiction in the reign of Charles II.[2] Since then, this lien has been confined in that country (until a statute passed in 1840 gave a lien to material men generally),[3] to the case of a shipwright or other person to whom possession of the ship has been given for the purpose of repair; he might retain his possession for his wages or charges as any other workman may any chattel (a tailor, clothing; a watchmaker, a watch;) by the common law of bailment.[4] This is undoubtedly in force in this country.[5] But our admiralty courts claim and exercise a full jurisdiction over all these claims and questions, and give to all material men a lien on the ship; provided the supplies were necessary and could be obtained only by a credit on the vessel.[6]

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[1] Dig. 14, 1, 1; Casaregis, Disc. 18; Ord. de la Mar. liv. 1, tit. 14, art. 16; 1 Valin, Com. 363; Consulat de la Mer, par Boucher, ch. 32, 33, 34. It is generally stated that this principle of the maritime law is derived from the civil law. See The General Smith, 4 Wheat. 438, 443; The Nestor, 1 Sumner, 73, 79; The Stephen Allen, Blatchf. & H. Adm. 175, 177. But this has been shown to be incorrect. The Young Mechanic, 2 Curtis, C. C. 404; The Calisto, Daveis, 29, 31.

[2] In the case of The Zodiac, 1 Hagg. Adm. 320, 325, Lord *Stowell* remarked: "In most of the countries governed by the civil law, repairs and necessaries form a lien on the ship itself. In our country, the same doctrine had for a long time been held by the maritime courts, but, after a long contest, it was finally overthrown by the courts of common law, and by the highest judicature in the country, the House of Lords, in the reign of Charles II." See Hoare *v.* Clement, 2 Show. 338; Justin *v.* Ballam, 1 Salk. 34, 2 Ld. Raym. 805; Watkinson *v.* Bernadiston, 2 P. Wms. 367; Wilkins *v.* Carmichael, 1 Doug. 101; Ex parte Shank, 1 Atk. 234. See also, The Neptune, 3 Hagg. Adm. 129, 140; The John, 3 Rob. Adm. 170.

[3] 3 & 4 Vict. ch. 65, § 6. For decisions under this act see The Alexander, 1 W. Rob. 288; The Sophie, id. 368; The Ocean Queen, id. 457; The Ocean, 2 W. Rob. 368.

[4] Ex parte Bland, 2 Rose, 91; Franklin *v.* Hosier, 4 B. & Ald. 341; The Vibilia, 1 W. Rob. 1, 6. But he cannot detain the vessel against the authority of the Court of Admiralty, when the ship is in the possession of its officer, though that court will then protect his rights. The Harmonie, 1 W. Rob. 178.

[5] Nicholson *v.* May, Wright, 660; The General Smith, 4 Wheat. 438, per *Story*, J.; The Sch. Marion, 1 Story, 68.

[6] Pratt *v.* Reed, 19 How. 359. It has accordingly been held, that it must be proved that the owner had no funds or credit on which to procure the supplies except the credit of the vessel. Brown *v.* Propeller Albany, U. S. D. C., N. Y., Boston Courier, Feb. 13, 1858. Mr. Justice *Curtis* has, however, said, after speaking of the decision in Pratt *v.* Reed, that "the liens given by the local law do not depend on the same requirements." The Young Sam, 20 Law Reporter, 608, 610.

This lien or "privilegium," by the civil law and the general maritime law, extends to all ships without any distinction between foreign and domestic vessels.[1] Here, however, it is otherwise; and there is no lien on domestic ships, unless it is given by the law of the State in which the supplies are furnished.[2] For the purpose of this distinction, each of our States is considered foreign to the rest; so that material men in New York would there have a lien in admiralty for work done on a Philadelphia ship.[3] So

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[1] See *supra*, p. 491, note 1.

[2] In regard to domestic ships we have seen that if the builder, or person making repairs, retains possession, he has a common law lien. This may be enforced in admiralty. The Schooner Marion, 1 Story, 68, 72. The case of Peyroux *v.* Howard, 7 Pet. 324, seems to rest upon this principle, for the Civil Code of Louisiana, under which the case was decided, gives no greater privilege than a material man has in other States by the common law. But if the possession is parted with, it is well settled that this lien is gone. The General Smith, 4 Wheat. 438; The St. Jago de Cuba, 9 id. 409; Buddington *v.* Stewart, 14 Conn. 404; Boon *v.* The Hornet, Crabbe, 426; Tree *v.* The Indiana, id. 479; The Stephen Allen, Blatchf. & H. Adm. 175; Turnbull *v.* The Ship Enterprise, Bee, Adm. 345; Clinton *v.* The Brig Hannah, id. 419. In cases of foreign ships the lien does not depend upon possession. North *v.* Brig Eagle, Bee, Adm. 78; The Jerusalem, 2 Gallis. 345; Ex parte Lewis, id. 483; Zane *v.* The Brig President, 4 Wash. C. C. 453; The Gustavia, Blatchf. & H. Adm. 189; The Schooner Active, Olcott, Adm. 286; Cole *v.* The Atlantic, Crabbe, 440; Tree *v.* The Indiana, id. 479. If a vessel is in her home port, but held out by her owners as a foreign vessel, it seems that material men, who repair her, or furnish supplies, will have a lien, if the imposition practised upon them is such as to mislead men of ordinary vigilance. The St. Jago de Cuba, 9 Wheat. 409. So if a vessel puts into an enemy's port, and pretends to be a neutral, her owners are liable. Musson *v.* Fales, 16 Mass. 332. Though the vessel is in a foreign port, yet if the owners are present, or if they have an agent there, who will advance what is necessary, there is no lien. Boreal *v.* The Golden Rose, Bee, Adm. 131; Shrewsbury *v.* Sloop Two Friends, id. 433; Pritchard *v.* Schooner Lady Horatia, id. 167. The case of North *v.* Brig Eagle, id. 78, is perfectly consistent with these cases, for the supplies were furnished on the express stipulation that the vessel should be liable, and the owners were not known. See also, Williams *v.* The Polly, cited Bee, Adm. 168.

[3] This doctrine has grown out of a *dictum* in the case of The General Smith, 4 Wheat. 438, but it may now be considered as settled. See Pratt *v.* Reed, 19 How. 359; The Brig Nestor, 1 Sumner, 73; The Barque Chusan, 2 Story, 455; Leland *v.* The Ship Medora, 2 Woodb. & M. 92; Davis *v.* Child, Davcis, 71; Sarchet *v.* The Sloop Davis, Crabbe, 185; The Stephen Allen, Blatchf. & H. Adm. 175; Nickerson *v.* Schooner Monsoon, U. S. D. C., Mass., 5 Law Reporter, 416; Reeder *v.* The Steamship George's Creek, U. S. D. C., Maryland, 3 Am. Law Register, 232; Dudley *v.* The Steamboat Superior, 1 Newb. Adm. 176; Leddo *v.* Hughes, 15 Ill. 41. But see Beach *v.* Sch. Native, U. S. D. C., N. Y., ante, p. 490, note 7. If it is in controversy to which State a vessel belongs, the enrolment made under oath by the managing owner, pursuant to the act of congress, requiring it to be made at the port nearest the residence of the owner, is *primâ facie* evidence that the vessel belonged to that port,

far as this jurisdiction belongs to the admiralty courts and is practised there, we shall not treat of it at length until we reach this topic in our chapters on Admiralty. But many of our States have, by statute, given this lien to material men against ships in their home ports.[1] We must refer to these statutes for their es-

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and will require clear proof of the notorious residence of the owner or owners at some other place to overcome it; and the presumption is strengthened by the fact that the boat has on its stern its registered name, and the name of the port of enrolment. Dudley *v.* The Steamboat Superior, *supra*. In Tree *v.* The Indiana, Crabbe, 479, the enrolment was considered as conclusive. But this position was held to be incorrect in Hill *v.* The Golden Gate, 1 Newb. Adm. 308. *Taney*, C. J., in a case before him in the Circuit Court of Delaware, mentioned in Sarchet *v.* The Sloop Davis, Crabbe, 185, doubted whether a vessel built in Delaware, where her owner lived, and brought up to Philadelphia for the purpose of being rigged, without being enrolled or licensed, could be considered as a foreign vessel, so as to give the court jurisdiction. In Weaver *v.* The S. G. Owens, 1 Wallace, Jr., 359, it was said that the residence of the owner determined whether a vessel was domestic or not, and for this purpose the person rightfully in possession, or having the control of the vessel by appointing the officers, would be considered as owner whether he was lessee, mortgagee, or parol vendee, even though some other person might be the registered owner and have the legal title or general ownership in himself. And in Hill *v.* The Golden Gate, 1 Newb. Adm. 308, the charterers who were in possession were considered as the owners, and the supplies being furnished in the port where they resided, the vessel was held not to be liable. But in Thomas *v.* Osborn, 19 How. 22, 29, it was held, that the master, though he was the charterer, could bind the vessel for necessary repairs in a foreign port. It was held, in The Sch. Active, Olcott, Adm. 286, that a ship built in this country for alien residents abroad, was a foreign vessel, and could be libelled for supplies furnished on her first voyage, although she had not been documented conformably to the laws of this country or of the domicil of her foreign owners. See also, Parmlee *v.* The Charles Mears, 1 Newb. Adm. 197. But in Scott *v.* The Plymouth, 1 Newb. Adm. 56, 6 McLean, C. C. 463, it was held, that a vessel built at Cleveland under a contract with parties resident at Buffalo, in New York, belonged to Cleveland until after her delivery and first voyage.

[1] Maine, Rev. Stats. ch. 91, § 6–14; New Hampshire, Compiled Statutes of 1853, tit. xv. ch. 139; Massachusetts, Acts of 1848, ch. 290, Acts of 1855, ch. 231; New York, 2 Rev. Stats. Denio and Tracy's ed., 733, Act of 1855, ch. 110, amending the preceding statute, and Act of 1858, ch. 247, providing for the registry of liens and incumbrances upon boats navigating the canals of the State; Laws of Pennsylvania, Dunlop's ed., 681, Act of 1858, No. 404; Georgia, Cobb's Dig. 426, Act of 1852, No. 137; Alabama, Code of 1852, p. 491; Florida, Stat. of 1847, Thompson's Dig. 413, Act of 1848, ch. 268, Act of 1850, ch. 406; Arkansas, Rev. Stats. ch. 14; Tennessee, Act of 1833, ch. 35; Kentucky, Act of 1839, ch. 1088, Act of 1841, ch. 267; Statutes of Ohio, Swan's ed., 1854, p. 185, ch. 26; Compiled Laws of Michigan, 1857, ch. 149, vol. 2, p. 1313; Indiana, Rev. Stats. 1852, vol. 2, p. 183; Illinois, Rev. Stats. 1845, p. 71, Ed. of 1858, vol. 2, p. 785; Missouri, Rev. Stats. 1855, vol. 1, p. 302; Iowa, Code of 1851, p. 293, Act of 1854, ch. 125; Wisconsin, Rev. Stats. 1849, ch. 116; Laws of California, First Session, p. 189, ch. 75, § 2, Compiled Laws of 1853, p. 576, ch. 6, § 318. In Louisiana a similar privilege exists under the general Spanish law. See Bourcier *v.* Schooner Ann, 1 Mart. La.

pecial provisions, which do not, however, generally differ very much from the rules of admiralty in relation to the same lien. We will here state some of the results of adjudication upon them.

In New York the lien of the builder attaches as soon as the structure assumes the form of a ship.[1] The statute does not apply to canal boats.[2] But it has been held to apply to an old steamboat which was fitted up as a theatre, and used as such at different river ports, and the vessel was held liable though some of the supplies were furnished for the theatre.[3] A debt for goods furnished is not contracted till the goods are actually delivered, and an agreement to deliver is not enough.[4] If the creditor permits the vessel to sail without enforcing his lien he loses it, but if she sails on a trial trip merely, for the purpose of testing her machinery, this is not a departure within the statute.[5] So, if she leaves the State in a fraudulent manner, at a time when she was not legally liable to arrest.[6] Where repairs were put on a boat running from New York to Albany, at different times under one general order to repair the boat when necessary, it was held that the contract was not an entire or indivisible one, but that each job constituted a separate debt, and that every trip of the boat was a departure within the statute.[7] Wood for fuel

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165. See also, The Civil Code, art. 2748, and the case of Peyroux *v.* Howard, 7 Pet. 324, 341.

[1] Phillips *v.* Wright, 5 Sandf. 342.

[2] Many *v.* Noyes, 5 Hill, 34. But special provision is made for canal boats by the Act of 1858, c. 247.

[3] Pendleton *v.* Franklin, 3 Seld. 508, affirming the same case, Franklin *v.* Pendleton, 3 Sandf. 572.

[4] Veltman *v.* Thompson, 3 Comst. 438; The Alida, Abbott, Adm. 173.

[5] Hancox *v.* Dunning, 6 Hill, 494.

[6] The Steamboat Joseph E. Coffee, Olcott, Adm. 401. See also, Nicholson *v.* May, Wright, 660. By the statute under which these decisions were made, the debt ceased to be a lien at the expiration of twelve days after the day of departure to a port within the State. And in all cases the lien was to cease immediately after the vessel's leaving the State. This is amended by the Act of 1855, so that the lien remains in force till the expiration of sixty days after the return of the vessel to the port at which she was when the debt was contracted, but in all cases the lien ceases immediately after the vessel leaves such port, unless within ten days after such departure, a specification of the lien is sworn to and filed in the county clerk's office of the county where such lien is created.

[7] Rockefeller *v.* Thompson, 2 Sandf. 395; The Alida, Abbott, Adm. 165. The same rule was laid down in a suit against the same boat, for coal furnished at different times under one agreement. Abbott, Adm. 173.

has been held in New York not to be included within the term "supplies."[1] But in Illinois the point has been determined the other way.[2] And in New York it has been held to come within the term "stores."[3] In Maine the lien is on the vessel while building, and continues for four days after she is launched. If the materials are sold on time, and this time is not elapsed at the expiration of the four days, the lien is gone.[4] The materials must be actually used in the construction of the vessel, and it is not sufficient that they were furnished under a representation that they were to be used.[5] The statute does not embrace tools or other articles used by the workmen in doing their work, but only materials which go into the ship and make part of it when finished.[6] Nor has a person a lien who procures insurance on a

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[1] Johnson *v.* Steamboat Sandusky, 5 Wend. 510; The Fanny, cited Abbott, Adm. 185.

[2] Clark *v.* Smith, 14 Ill. 361.

[3] Crooke *v.* Slack, 20 Wend. 177; The Alida, Abbott, Adm. 173, 185.

[4] Scudder *v.* Balkam, 40 Maine, 291. See also, The Kearsarge, Ware, 2d ed. 546, 550.

[5] Taggart *v.* Buckmore, 21 Law Reporter, 51. It was also held in this case that if the materials were furnished for one vessel and used in another, the lien would attach to the latter; and that if some of the materials were used and others not, and judgment should be obtained for the amount of the whole, the lien would be waived, as the value of the articles not used would be merged in the judgment, and could not be separated from the other part. In The Young Sam, U. S. C. C., 20 Law Reporter, 608, Mr. Justice *Curtis* held, that under the Maine statute, the party furnishing the materials must have reference to some particular vessel, in the construction or repairs of which the lien was intended to be created. And a doubt was expressed whether any case could come within the statute, if the particular vessel had not begun to be built before the sale of the materials. In Sewall *v.* The Hull of a New Ship, Ware, 2d ed. 565, the libellant furnished timber to ship-builders, who, at the time, were building the vessel, against which the lien was sought to be enforced. Nothing was said at the time that the timber was to be used for any particular vessel, and it did not appear that it was charged in the books to this vessel. The court held that no lien existed. So it is not sufficient to prove that the materials were sold for the declared purpose of being used in the building of the vessel, but their positive use must be shown. And if only part was used, the material man must show what that was. Phillips *v.* Wright, 5 Sandf. 342. See also, Clark *v.* Smith, 14 Ill. 361. In The Kiersage, 2 Curtis, C. C. 421, it was held, overruling the decision of the District Court, in the same case, Ware, 2d ed., 546, that if materials are furnished for two vessels, being built for the same person, the party furnishing them has not a lien on one vessel for all the materials, but only for what was used in the vessel proceeded against, though both the vessels were of the same size and model.

[6] The Kearsarge, Ware, 2d ed. 546. In Ames *v.* Dyer, 41 Maine, 397, it was held that no lien existed for materials furnished for the moulds of the ship, or for labor employed in making the same.

cargo of timber purchased for and used in the construction of a ship, he being no otherwise interested in the timber. But it would seem that he would have the lien, were he the furnisher of the materials.[1]

The Massachusetts statute of 1848, provided that if the vessel sailed from one port in the State to another, the lien should cease at the expiration of twenty days after the day of departure; and in all cases should cease after the vessel's arrival at a port out of the Commonwealth. In one case the vessel sailed from Newburyport for Boston, but in consequence of head winds and a dense fog, put into Portsmouth in New Hampshire, and it was held that the lien was lost.[2] The statute of 1855 gives a lien to certain persons when money is due to them by reason of any contracts express or implied with the *owners* of any ship or vessel, etc. It has been held that the word "owners" means special as well as general owners, so that a person repairing a vessel under a contract made with a special owner has a lien.[3] Under the third section of the statute providing for the mode of enforcing the lien in the State court, it has been held that the petition cannot be filed until the sum has remained unpaid sixty days after it was payable.[4] A trench excavated in front of the

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[1] The Kearsarge, Ware, 2d ed. 546, 549. Mr. Justice *Ware*, in this case said: "Another item in the account objected to, is a charge of insurance paid by the libellants on a cargo of timber procured for the ship and used in her construction. Had such a charge been made by the vendor and furnisher of the materials, it might perhaps, like the freight, be allowed as part of the cost of materials at the place of delivery, unless by the bargain they were to be delivered at the ship-yard of the builders, and then the insurance, as well as freight, would be involved in the price. But the insurance here was procured by a stranger, and if he can claim in this libel, it must be in the character of a material man. But the mere payment of insurance on a cargo of lumber, though actually furnished for the ship and used in the construction, cannot give him the character of a furnisher of materials in the sense of the law."

[2] The Sam Slick, 2 Curtis, C. C. 480, reversing the decree of the District Court, Hooper *v.* The Sam Slick, 18 Law Reporter, 162.

[3] Hawes *v.* Bark James Smith, U. S. D. C., Mass., 1858. The owner of the vessel in this case made a contract of sale by which the vendees were to have possession of the vessel, and if not paid for within a certain time, possession was to revert to the owner. While in the possession of the vendees repairs were put upon the vessel, and it was held that these constituted a lien upon her which was enforced after the original owner had resumed possession in consequence of a breach of the condition.

[4] Tyler *v.* Currier, S. J. C., Mass., 20 Law Reporter, 657. See also, as to the proper mode of serving the petition, Patrick *v.* Tafts, Superior Court, Suffolk Co., Mass., 21 Law Reporter, 163.

launching ways of a ship for the purpose of deepening the water, does not make part of the launching ways within the statute.[1]

In Pennsylvania the lien continues until the vessel goes to sea, although the owner becomes bankrupt before her departure.[2] Among others mentioned in this statute are ship-chandlers, to whom a lien is given for articles used in the fitting, furnishing, and equipping of a vessel; and it has been held that every debt contracted with a ship-chandler for articles or materials used for any of these purposes is within the law.[3]

If a barge is necessary to a steamboat, its hire to it will be regarded as a material furnished for its equipment.[4] And, in some States, money loaned to a person to enable him to build a vessel, gives the lender a lien; in others it does not.[5]

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[1] Wooly *v.* Ship Peruvian, U. S. D. C., Mass., 1858, 21 Law Reporter, 153.

[2] Shoemaker *v.* Norris, 3 Yeates, 392.

[3] Weaver *v.* The S. G. Owens, 1 Wallace, Jr. 358. The articles, for which the lien was enforced, were "ropes, ship-tools, sea-stores, provisions, glass and Britannia ware, china, crockery, pencils, varieties of hardware, including cooking stoves, cooking utensils, muskets and other fire-arms," which latter were taken for defence upon a California voyage around Cape Horn.

[4] Amis *v.* Steamboat Louisa, 9 Mo. 621; Gleim *v.* Steamboat Belmont, 11 Mo. 112; Steamboat Kentucky *v.* Brooks, 1 Greene, Iowa, 398.

[5] Lawson *v.* Higgins, 1 Mann. Mich. 225. See also, The Kearsarge, Ware, 2d ed. 546. Nor is there any lien if the money is loaned to pay wages, and it is actually applied to that purpose. Steamboat P. H. White *v.* Levy, 5 Eng. 411; or for the use of the boat generally. McGuire *v.* Canal Boat Kentucky, 20 Ohio, 62; Dewitt *v.* Schooner St. Lawrence, 3 Ohio State, 325. If the statute of Illinois does apply to such a case, the party lending the money must show that a necessity existed. Leddo *v.* Hughes, 15 Ill. 41. And in Pearsons *v.* Tincker, 36 Maine, 384, it was held that if a person pays off the claim of one who has a lien on the vessel, at the request of the debtor, he does not acquire a right to enforce the lien in his own name, or in that of his assignee. And if a person indorse a note given by the master of a vessel for supplies furnished, and pay the same at its maturity, he does not thereby become subrogated to the rights of the person furnishing the supplies, so as to have a lien on the boat. Hays *v.* Steamboat Columbus, 23 Mo. 232. So goods furnished a master of a vessel to supply the place of goods lost in the course of transportation are not "supplies." Bailey *v.* Steamboat Concordia, 17 Mo. 357. But in the same State it is held that a note given for money loaned to a person to enable him to purchase a vessel is a lien upon it. Steamboat Lebanon *v.* Grevison, 10 Mo. 536. So if the money is lent with the understanding that it is to be appropriated to the debts of the vessel, but otherwise not. Bryan *v.* Steamboat Pride of the West, 12 Mo. 371; Phelps *v.* Steamboat Eureka, 14 Mo. 532. So if goods are furnished the master of a boat, to enable him therewith to purchase wood and other necessaries, a lien is created. Steam-

In Ohio, if a person has engaged to build and deliver a boat at a future day at a specific price, and has delivered it accordingly, he cannot afterwards proceed against it in the hands of a third person, to recover for materials, supplies, and labor, expended in building it.[1]

In Michigan there is no lien for supplies furnished while a vessel is being built.[2] In Missouri, if the supplies are furnished on the order of the steward, engineer, or mate, with the knowledge or consent of the master, they are considered as ordered by him.[3]

This lien extends beyond mere repairs; certainly to the alterations of a vessel,[4] and perhaps to its reconstruction; but not to its original construction,[5] unless the statute includes ship-build-

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boat General Brady *v.* Buckley, 6 Mo. 558. These cases depend somewhat upon the peculiar provisions of the State statutes, under which they were decided.

[1] Canal Boat Etna *v.* Treat, 15 Ohio, 585, 16 Ohio, 276.

[2] Lawson *v.* Higgins, 1 Mann. Mich. 225.

[3] Voorhees *v.* Steamboat Eureka, 14 Mo. 56. See also, generally, George *v.* Skeates, 19 Ala. 738; Leddo *v.* Hughes, 15 Ill. 41; Steamboat P. H. White *v.* Levy, 5 Eng. 411; Flint River Steamboat Co. *v.* Roberts, 2 Florida, 102.

[4] The Ferax, U. S. D. C., Mass., 12 Law Reporter, 183.

[5] In Clinton *v.* Brig Hannah, Bee, Adm. 419, it was held that a shipwright could not sue *in rem* for his wages for building a vessel. And in a case before *Taney*, C. J., in the United States Circuit Court of Delaware, cited in Crabbe, 199, it was doubted whether the rigging of a new vessel came within the views or language of the maritime laws which give a lien to material men for repairs. But in Parmlee *v.* The Charles Mears, 1 Newb. Adm. 197, a contract for building a vessel, made with the owners in another State, was enforced. This question came before the court in a recent case. People's Ferry Co. *v.* Beers, 20 How. 393. The libel was filed against the vessel *in rem* to recover the balance due on a contract for building the vessel. The libellant resided in New Jersey, and the respondent in New York. The vessel was built in New Jersey and delivered to the owner in New York previous to the bringing of this action. There was no lien given by any New Jersey statute, and the only question was whether the contract for building a vessel was of such a maritime nature that it could be enforced in admiralty. The court said: "The lien attaches to foreign ships and vessels only in favor of the carpenter who repairs in a case of necessity, and in the absence of the owner. It would be a strange doctrine to hold the ship bound, in a case where the owner made the contract in writing, charging himself to pay by instalments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land." The case of Cunningham *v.* Hall, which we have already referred to, ante, p. 69, was an action *in personam* against the builder to recover damages for the breach of an implied contract to build a sea-worthy vessel.

ing.[1] These statute liens take precedence of the claims of all other creditors.[2] But a laborer employed in general work by a shipwright or mechanic engaged upon the vessel, and who is

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When the case came before the circuit court, it was dismissed for want of jurisdiction, on the ground that the contract was not one of a maritime nature. The decision was given by *Clifford*, J., September 6, 1858.

[1] The lien given by a State statute to persons building a vessel, has been enforced in admiralty in numerous cases. The Calisto, Daveis, 29, s. c. *nom.* Read *v.* The Hull of a New Brig, 1 Story, 244; The Hull of a New Ship, Daveis, 199; The Young Mechanic, Ware, 2d ed. 535, 2 Curtis, C. C. 404; The Kearsarge, Ware, 2d ed. 546, 2 Curtis, C. C. 421; Purinton *v.* The Hull of a New Ship, Ware, 2d ed. 556, 2 Curtis, C. C. 416; Sewall *v.* The Hull of a New Ship, Ware, 2d ed. 565; Davis *v.* A New Brig, Gilpin, 473. And in The Ship Harriet, Olcott, Adm. 229, and The Ship Harvest, id. 271, services which were not maritime in their nature, were enforced in admiralty, as they were made a lien on the vessel by the State law. But in the above case of the People's Ferry Co. *v.* Beers, 20 How. 393, the court said: "It is proper, however, to notice the fact, that district courts have recognized the existence of admiralty jurisdiction *in rem* against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien had been created by the local law of the State where the vessel was built. Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court." Mr. Justice *Betts* has acted upon the above suggestion in a late case by holding that the lien given by a State statute for building and equipping a vessel could not be enforced in admiralty. The Sch. Coernine, U. S. D. C., N. Y., 1858, 21 Law Reporter, 343. A contrary decision was given in the case of The Revenue Cutter No. 1, U. S. D. C., Ohio, 21 Law Reporter, 281. An action was brought *in rem* by a person furnishing materials to the original contractor, under the statute of Ohio, which gives a lien to parties building a vessel, and to those who furnish materials for building. The assignees of the original builders intervened as claimants, alleging a lien by virtue of their contract with the owner. The court held that as the contract between the builders and owners was not a *maritime* contract no lien existed, in their favor; that there was no privity of contract between the libellant and the owner, but, for the supplies furnished to the builders a lien was given by the State law which could be enforced in admiralty. See post, p. 501, n. 2.

[2] The Hull of a New Ship, Daveis, 199; Sewall *v.* The Hull of a New Ship, Ware, 2d ed. 565; The Kiersage, 2 Curtis, C. C. 421, 423; Dudley *v.* The Steamboat Superior, U. S. D. C., Ohio, 3 Am. Law Reg. 622. In The Young Mechanic, Ware, 2d ed. 535, 2 Curtis, C. C. 404, the lien of the material man was preferred to the claim of one who had lent money to the owner for the purpose of building the vessel, and had taken a mortgage from the owner. And this, though the person who employed the libellant was dead, insolvent, and by the laws of the State such a claim was not a preferred debt. See also, The Revenue Cutter No. 1, U. S. D. C., Ohio, 21 Law Reporter, 281. In Reeder *v.* Steamship George's Creek, U. S. D. C., Maryland, 3 Am. Law Reg. 232, the vessel ran between New York and Baltimore. In the summer of 1854 repairs were put upon her in Baltimore. In December, 1853, she was mortgaged by her owners to parties in New York to secure the payment of $30,000. This mortgage was duly recorded in the office of the collector of customs at the port of New York where the vessel was enrolled, and also in the office of the register of

employed sometimes on the vessel and sometimes elsewhere, has no lien on the vessel for that part of his labor which is performed upon it.[1] The lien given by the maritime law or by a

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conveyances for the city of New York. On the 17th of October, 1854, a decree was passed by the superior court for the city of New York for the sale of the vessel to pay the mortgage debt. This libel was filed on the 18th of the same month. The court held that the lien of the material man might still be enforced. The principle recognized in this case that a vessel may be proceeded against, though in the hands of a *bonâ fide* purchaser, is well settled. The Schooner Marion, 1 Story, 68, 72; The Barque Chusan, 2 id. 455; Cole *v.* The Atlantic, Crabbe, 440. In the Barque Chusan, Mr. Justice *Story* said: "The lien, however, which is given by the maritime law on the ship, although it is, or may be treated as, a permanent or abiding lien upon the ship, until the debt is paid, as between the original owners, and the material men, and their personal representatives, is liable to a very different consideration, when the ship has passed into the hands of a *bonâ fide* purchaser, for a valuable consideration, without notice of the lien. In respect to such a purchaser, the lien must be enforced within a reasonable time after the debt is due, and the credit, if any, has expired; otherwise a court of admiralty will protect him, as a court of equity would do, against the claim as stale and inequitable. What will constitute a reasonable time, must depend upon the circumstances of each particular case, and is not a point susceptible of any definite or universal formulary of interpretation." It is difficult to reconcile the cases where the question of the loss of the lien by delay has arisen. See Reeder *v.* Steamship George's Creek, and Cole *v.* The Atlantic, *supra*, on one side, and Leland *v.* The Medora, 2 Woodb. & M. 92, 99; Bryant *v.* Brig Lillie Mills, U. S. D. C., Mass., 18 Law Reporter, 494; The Utility, Blatchf. &. H. Adm. 218; on the other side. If a creditor advances money to the builder on a mortgage of the vessel, he succeeds to the place of the owner, and takes an interest in the vessel subject to the liens of the material men. The Kearsarge, Ware, 2d ed. 546.

[1] The Calisto, Daveis, 29; s. c. Read *v.* The Hull of a New Brig, 1 Story, 244. The question has been considerably discussed whether sub-contractors, and day laborers, not employed by the owner, master, or consignee, have a lien for work done, or materials furnished at the request of a person employed by the owner, master, or consignee. In Maine it is held that such a lien exists, in favor of a person performing labor on a vessel. Purinton *v.* The Hull of a New Ship, Ware, 2d ed. 556, 2 Curtis, C. C. 416. But a doubt has been intimated whether a sub-contractor furnishing supplies would have the same right. The Young Sam, 20 Law Reporter, 608, 610, per *Curtis*, J. In the State courts it has been held that a sub-contractor cannot sue the owner and attach the vessel, but he should sue the person who employed him, and attach the vessel. Ames *v.* Swett, 33 Maine, 479; Atwood *v.* Williams, 40 Maine, 409. In Doe *v.* Monson, 33 Maine, 430, an action against the contractor, and the owner as trustee, was sustained. In Smith *v.* Steamer Eastern Railroad, 1 Curtis, C. C. 253, it was held that no lien existed in such a case under the Massachusetts statute of 1848. But in a subsequent case before Mr. Justice *Sprague*, it was held that that decision did not apply to the case of a person furnishing materials to the builder of a ship, he not knowing that the vessel was owned by another party. Hooper *v.* The Sam Slick, U. S. D. C., Mass., 18 Law Reporter, 162. In Smith *v.* Steamer Eastern Railroad, the repairs were made on an old vessel known to be owned by parties other than the contractors. The Act of 1855, ch. 231, has put the matter at rest by providing that a

State statute may be enforced against the vessel though she is owned by government, in the same way as if a private citizen was the owner.[1]

All persons having a lien on a ship by a State statute, may enforce it in the State courts; and there have been many decisions permitting the enforcement of this lien in the admiralty courts sitting in that district.[2] But as the maritime law does not give a lien, for repairs or supplies furnished to a domestic ship, the courts of admiralty can enforce the lien only because the statute gives it; and in applying the statute and enforcing the lien, they would doubtless be governed by the terms of that

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lien shall exist in all such cases. In the case of Otis *v.* Brig Whitaker, U. S. D. C., Mass., 18 Law Reporter, 496, which seems to follow Smith *v.* Steamer Eastern Railroad, it does not appear whether the services were rendered before or after the passing of the statute, and the vessel was proceeded against as a foreign vessel. But there can be no doubt that in a case under the statute of 1855, under similar circumstances, a lien would exist. The lien exists in Ohio, Webster *v.* Brig Andes, 18 Ohio, 187. So in Kentucky, unless the owner of the vessel has paid the person who employed the sub-contractors. Stephens *v.* Ward, 11 B. Mon. 337. But there is no lien in New York, Pennsylvania, or Indiana. Hubbell *v.* Denison, 20 Wend. 181; Harper *v.* The New Brig, Gilpin, 536; Southwick *v.* Packet Boat Clyde, 6 Blackf. 148. And in Childs *v.* Steamboat Brunette, 19 Mo. 518, it was held that a ship-carpenter who contracts to repair a boat and furnish materials is not an agent within the meaning of the act concerning boats and vessels, and cannot create a lien on the boat in favor of a party from whom he purchased materials.

[1] The Revenue Cutter No. 1, U. S. D. C., Ohio, 21 Law Reporter, 281. In this case, *Wilson*, J., said: "If the property is legally incumbered by mortgage or other liens, the transfer of title does not divest it of those incumbrances. In this respect the government stands upon precisely the same footing as that of individuals. In controversies in courts of justice, involving the rights of property, it has no muniments of title sanctified by sovereignty which should exempt it from the rules of law governing individuals in like cases."

[2] Peyroux *v.* Howard, 7 Pet. 324; Weaver *v.* The S. G. Owens, 1 Wallace, Jr. 358; Sutton *v.* The Albatross, 2 id. 327; Raymond *v.* Schooner Ellen Stewart, 5 McLean, C. C. 269; The Ferax, U. S. D. C., Mass., 12 Law Reporter, 183; Phillips *v.* The Thomas Scattergood, Gilpin, 7; Hooper *v.* The Sam Slick, 18 Law Reporter, 162; The John Walls, Jr. 12 id. 24. But see ante, p. 498, n. 5. The 12th Admiralty rule of the Supreme Court provides that there shall be a proceeding *in rem* in cases of domestic ships, where by the local law a lien is given to material men for supplies, repairs, or other necessaries. The general doctrine, then, that the admiralty has jurisdiction where the State law gives a lien, must be taken as subject to this rule, that the party claiming the lien must be a *material man*, and that the lien must be for "supplies, repairs, or other necessaries." It has accordingly been held that although the law of a State gives a lien to a wharfinger, yet as he is not a "material man," he cannot enforce his lien in the admiralty. Russel *v.* The Asa R. Swift, 1 Newb. Adm. 553.

statute, and not by the maritime law generally, wherever those terms were explicit.[1] But in construing those terms where doubtful, they would probably be influenced by admiralty principles, which are those of equity, and would doubtless apply them to a case distinctly before them; although the case itself might not come within their jurisdiction, except by force of the statute.

It has been said that if a person furnishing a foreign ship, gives credit, the lien is discharged or does not attach, so that a suit *in rem* will not lie to enforce it.[2] But this is stated too broadly. The lien is not waived unless the contract contains stipulations inconsistent with it.[3]

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[1] The General Smith, 4 Wheat. 438; The Barque Chusan, 2 Story, 455, 462; The Ship Robert Fulton, 1 Paine, C. C. 620, 626; The Calisto, Daveis, 29, 33; The Stephen Allen, Blatchf. & H. Adm. 175, 179; Harper *v.* The New Brig, Gilpin, 536; Tree *v.* The Indiana, Crabbe, 476.

[2] Zane *v.* The Brig President, 4 Wash. C. C. 453.

[3] Peyroux *v.* Howard, 7 Pet. 324, 344; The Brig Nestor, 1 Sumner, 73, 80; Phillips *v.* Wright, 5 Sandf. 342. Thus if the duration of the lien is fixed by law, and credit is given which extends beyond that time, the lien is considered as waived. Peyroux *v.* Howard, 7 Pet. 324, 344; Remnants in Court, Olcott, Adm. 382; Veltman *v.* Thompson, 3 Comst. 438. But if the credit may expire before the lien, then, whether it is waived or not, is a question of intention. The Kearsarge, Ware, 2d ed. 546. If credit is given for a definite time, the lien is suspended till that time expires, but may be enforced afterwards. The Brig Nestor, 1 Sumner, 73, 85; The John Walls, Jr., U. S. D. C., Mass., 12 Law Reporter, 24. If a party furnishing materials before the vessel is completed or named, charges them to the owner on his books, this is no waiver of the lien, it appearing that he had no intention of relinquishing it. Hooper *v.* The Sam Slick, U. S. D. C., Mass., 18 Law Reporter, 162. The giving of a note does not, as a general thing, amount to a waiver of the lien, and the claim will be enforced against the ship if the note is surrendered at the trial. The Brig Nestor, 1 Sumner, 73, 86; The Bark Chusan, 2 Story, 455, 467; Leland *v.* The Ship Medora, 2 Woodb. & M. 92, 100; Raymond *v.* The Schooner Ellen Stewart, 5 McLean, C. C. 269; Sutton *v.* The Albatross, 2 Wallace, C. C. 327; The Schooner Active, Olcott, Adm. 286; The Steamer Fashion, U. S. D. C., Mich., 18 Law Reporter, 50; Merrick *v.* Avery, 14 Arkan. 370; Steamboat Charlotte *v.* Kingsland, 9 Mo. 66.

APPENDIX.

APPENDIX.

Two modes of arranging these statutes and statutory provisions have been considered; one, to place them in the chronological order of their enactment; the other, to group them by their subjects, so that those which relate to the same matter, may be found together. The latter method has obvious advantages, and has been given up only because it was found to be open to very serious objections. The most important of these arise from the fact that many provisions of great moment are intercalated in statutes where they have no legitimate place. For example, the enactment against flogging of seamen is contained — not in a separate section — but in a mere proviso, in an appropriation bill! This prevailing want of an arrangement by subjects in the statutes themselves, makes it difficult to arrange them thus in this Appendix. And, upon the whole, it has seemed best to place them chronologically, and facilitate a reference to them, partly by a list, and much more by a full index of the matters in the Appendix, which will follow immediately after the Appendix itself.

ACT OF 1789, CHAPTER IX. (1 U. S. Stats. at Large, 53).

An Act concerning Pilots.

SEC. 4. *And be it further enacted*, That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress.

ACT OF 1790, CHAPTER IX. (1 U. S. Stats. at Large, 112).

An Act for the Punishment of certain crimes against the United States.

SEC. 8. *And be it further enacted*, That if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the

jurisdiction of any particular State, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

Sec. 9. *And be it further enacted*, That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince, or State, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted, shall suffer death.

Sec. 10. *And be it further enacted*, That every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel, or advise any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed, and adjudged to be accessary to such piracies before the fact, and every such person being thereof convicted shall suffer death.

Sec. 11. *And be it further enacted*, That after any murder, felony, robbery, or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person who knowing that such pirate or robber has done or committed any such piracy or robbery, shall on the land or at sea receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed, and adjudged to be accessary to such piracy or robbery, after the fact; and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.

SEC. 12. *And be it further enacted*, That if any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavor to corrupt any commander, master, officer, or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in anywise trade with any pirate knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship; such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

SEC. 13. *And be it further enacted*, That if any person or persons, within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before mentioned, then and in every such case the person or persons so offending, their counsellors, aiders, and abettors (knowing of and privy to the offence aforesaid) shall, on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

ACT OF 1790, CHAPTER XXIX. (1 U. S. Stats. at Large, 131).

An Act for the Government and Regulation of Seamen in the Merchant Service.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of December next, every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declar-

ing the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided* such seaman or mariner shall perform such voyage: or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States: and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures, contained in this act.

Sec. 2. *And be it further enacted*, That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the log-book of such ship or vessel, of the name of such seaman or mariner, and shall in like manner note the time that he so neglected to render himself (after the time appointed); every such seaman or mariner shall forfeit for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any State, city, town, or county within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage.

Sec. 3. *And be it further enacted*, That if the mate or first officer under the master, and a majority of the crew of any ship or vessel, bound on a

voyage to any foreign port, shall, after the voyage is begun (and before the ship or vessel shall have left the land) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall, upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place where such inquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or if not, to some justice of the peace of the city, town, or place, taking with him two or more of the said crew who shall have made such request; and thereupon such judge or justice is hereby authorized and required to issue his precept directed to three persons in the neighborhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same in respect to the defects and insufficiencies complained of, and to make report to him the said judge or justice, in writing under their hands, or the hands of two of them, whether in any, or in what respect the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel will be necessary; and upon such report the said judge or justice shall adjudge and determine, and shall indorse on the said report his judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made or deficiencies supplied where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report, and judgment, to be taxed and allowed on a fair copy thereof, certified by the said judge or justice. But if the complaint of the said crew shall appear upon the said report and judgment, to have been without foundation, then the said master, or the owner, or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due to the complaining seamen or mariners. And if, after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs, or alterations as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace to commit by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common gaol of the county, there to remain without bail or main prize, until he shall have paid double the sum advanced to him at the time of subscrib-

ing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment, or other previous proceedings. *Provided*, That sufficient matter shall be made to appear, upon the return of such habeas corpus, and an examination then to be had, to detain him for the causes hereinbefore assigned.

Sec. 4. *And be it further enacted*, That if any person shall harbor or secrete any seaman or mariner belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof before any court in the city, town or county where he, she, or they may reside, shall forfeit and pay ten dollars for every day which he, she, or they shall continue so to harbor or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar, shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended.

Sec. 5. *And be it further enacted*, That if any seaman or mariner, who shall have subscribed such contract as is herein before described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs, in any court or before any justice or justices having jurisdiction of the recovery of debts to the value of ten dollars or upwards.

Sec. 6. *And be it further enacted*, That every seaman or mariner shall be entitled to demand and receive from the master or commander of the

ship or vessel to which they belong, one third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract: and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of admiralty courts, to answer for the said wages: and if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

Sec. 7. *And be it further enacted*, That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of peace within the United States (upon

the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear by due proof, that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction or common jail of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner.

Sec. 8. *And be it further enacted*, That every ship or vessel belonging to a citizen or citizens of the United States, of the burden of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine-chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

Sec. 9. *And be it further enacted*, That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores, and live-stock as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel shall pay to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages.

ACT OF 1792, CHAPTER XXIV. (1 U. S. Stats. at Large, 254).

An Act concerning Consuls and Vice-Consuls.

For carrying into full effect the convention between the King of the French, and the United States of America, entered into for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls;

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That where in the seventh article of the said convention, it is agreed that when there shall be no consul or vice-consul of the King of the French, to attend to the saving of the wreck of any French vessels stranded on the coasts of the United States, or that the residence of the said consul, or vice-consul (he not being at the place of the wreck) shall be more distant from the said place than that of the competent judge of the country, the latter shall immediately proceed to perform the office therein prescribed; the district judge of the United States of the district in which the wreck shall happen, shall proceed therein, according to the tenor of the said article. And in such cases it shall be the duty of the officers of the customs within whose districts such wrecks shall happen, to give notice thereof, as soon as may be, to the said judge, and to aid and assist him to perform the duties hereby assigned to him. The district judges of the United States shall also, within their respective districts be the competent judges, for the purposes expressed in the ninth article of the said convention, and it shall be incumbent on them to give aid to the consuls and vice-consuls of the King of the French, in arresting and securing deserters from vessels of the French nation according to the tenor of the said article.

And where by any article of the said convention, the consuls and vice-consuls of the King of the French, are entitled to the aid of the competent executive officers of the country, in the execution of any precept, the marshals of the United States and their deputies shall, within their respective districts, be the competent officers, and shall give their aid according to the tenor of the stipulations.

And whenever commitments to the jails of the country shall become necessary in pursuance of any stipulation of the said convention, they shall be to such jails within the respective districts as other commitments under the authority of the United States are by law made.

And for the direction of the consuls and vice-consuls of the United States in certain cases.

SEC. 2. *Be it enacted by the authority aforesaid*, That they shall have right in the ports or places to which they are or may be severally ap-

pointed of receiving the protests or declarations, which such captains, masters, crews, passengers, and merchants, as are citizens of the United States may respectively choose to make there; and also such as any foreigner may choose to make before them relative to the personal interest of any citizens of the United States; and the copies of the said acts duly authenticated by the said consuls or vice-consuls, under the seal of their consulates, respectively, shall receive faith in law, equally as their originals would in all courts in the United States. It shall be their duty, where the laws of the country permit, to take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any ship or vessel who shall die within their consulate; leaving there no legal representative, partner in trade or trustee by him appointed to take care of his effects, they shall inventory the same with the assistance of two merchants of the United States, or for want of them, of any others at their choice; shall collect the debts due to the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted; shall sell at auction after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and at the expiration of one year from his decease, the residue; and the balance of the estate they shall transmit to the treasury of the United States, to be holden in trust for the legal claimants. But if at any time before such transmission, the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings.

For the information of the representative of the deceased, it shall be the duty of the consul or vice-consul authorized to proceed as aforesaid in the settlement of his estate, immediately to notify his death in one of the gazettes published in the consulate, and also to the secretary of state, that the same may be notified in the State to which the deceased shall belong; and he shall also, as soon as may be, transmit to the secretary of state, an inventory of the effects of the deceased, taken as before directed.

Sec. 3. *And be it further enacted*, That the said consuls and vice-consuls, in cases where ships or vessels of the United States shall be stranded on the coasts of their consulates respectively, shall, as far as the laws of the country will permit, take proper measures, as well for the purpose of saving the said ships or vessels, their cargoes and appurtenances, as for storing and securing the effects and merchandise saved, and for taking an inventory or inventories thereof; and the merchandise and effects saved with the inventory or inventories thereof taken as aforesaid, shall, after deducting therefrom the expense, be delivered to the owner or

owners. *Provided*, That no consul or vice-consul shall have authority to take possession of any such goods, wares, merchandise, or other property, when the master, owner, or consignee thereof is present or capable of taking possession of the same.

SEC. 4. *And be it further enacted*, That it shall and may be lawful for every consul and vice-consul of the United States, to take and receive the following fees of office for the services which he shall have performed.

For authenticating under the consular seal, every protest, declaration, deposition, or other act, which such captains, masters, mariners, seamen, passengers, merchants or others as are citizens of the United States may respectively choose to make, the sum of two dollars.

For the taking into possession, inventorying, selling, and finally settling and paying, or transmitting as aforesaid, the balance due on the personal estate left by any citizen of the United States who shall die within the limits of his consulate, five per centum on the gross amount of such estate.

For taking into possession and otherwise proceeding on any such estate which shall be delivered over to the legal representatives before a final settlement of the same, as is herein before directed, two and an half per centum on such part delivered over as shall not be in money, and five per centum on the gross amount of the residue.

And it shall be the duty of the consuls and vice-consuls of the United States, to give receipts for all fees which they shall receive by virtue of this act, expressing the particular services for which they are paid.

SEC. 5. *And be it further enacted*, That in case it be found necessary for the interest of the United States, that a consul or consuls be appointed to reside on the coast of Barbary, the President be authorized to allow an annual salary, not exceeding two thousand dollars to each person so to be appointed: *Provided*, That such salary be not allowed to more than one consul for any one of the States on the said coast.

SEC. 6. *And be it further enacted*, That every consul and vice-consul shall, before they enter on the execution of their trusts, or if already in the execution of the same, within one year from the passing of this act, or if resident in Asia, within two years, give bond with such sureties as shall be approved by the secretary of state, in a sum of not less than two thousand nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office according to law, and also for truly accounting for all moneys, goods, and effects which may come into his possession by virtue of this act: and the said bond shall be lodged in the office of the secretary of the treasury.

Sections 7 and 8 are repealed.

SEC. 9. *And be it further enacted*, That the specification of certain

powers and duties, in this act, to be exercised or performed by the consuls and vice-consuls of the United States, shall not be construed to the exclusion of others resulting from the nature of their appointments, or any treaty or convention under which they may act.

ACT OF 1792, CHAPTER I. (1 U. S. Stats. at Large, 287).

An Act concerning the Registering and Recording of Ships or Vessels.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That ships or vessels, which shall have been registered by virtue of the act, entituled "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and those which after the last day of March next, shall be registered, pursuant to this act, and no other (except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one of them) shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels: *Provided*, That they shall not continue to enjoy the same, longer than they shall continue to be wholly owned, and to be commanded by a citizen or citizens of the said States.

SEC. 2. *And be it further enacted*, That ships or vessels built within the United States, whether before or after, the fourth of July, one thousand seven hundred and seventy-six, and belonging wholly to a citizen or citizens thereof, or not built within the said States, but on the sixteenth day of May, in the year one thousand seven hundred and eighty-nine, belonging and thenceforth continuing to belong to a citizen or citizens thereof, and ships or vessels which may hereafter be captured in war, by such citizen or citizens, and lawfully condemned as prize, or which have been, or may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by a citizen or citizens thereof, and no other, may be registered as hereinafter directed: *Provided*, That no such ship or vessel shall be entitled to be so registered, or if registered, to the benefits thereof, if owned in whole, or in part, by any citizen in the United States, who usually resides in a foreign country, during the continuance of such residence, unless such citizen be in the capacity of a consul of the United States, or an agent for, and a partner in, some house of trade or copartnership, consisting of citizens of the said States actually carrying on trade within the said States: *And provided further*, That no ship or vessel, built within the United States, prior to the said sixteenth day of May, which was not then owned wholly, or in part, by a citizen or citizens of the United States, shall be capable of being registered, by virtue

of any transfer to a citizen or citizens, which may hereafter be made, unless by way of prize or forfeiture: *Provided nevertheless*, That this shall not be construed to prevent the registering anew, of any ship or vessel, which was before registered, pursuant to the act before mentioned.

SEC. 3. *And be it further enacted*, That every ship or vessel, hereafter to be registered (except as is hereinafter provided) shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong, at the time of her registry, which port shall be deemed to be that, at or nearest to which, the owner, if there be but one, or if more than one, the husband, or acting and managing owner of such ship or vessel, usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. And if any ship or vessel of the United States, shall be found, without having her name, and the name of the port to which she belongs, painted in manner aforesaid, the owner or owners shall forfeit fifty dollars; one half to the person giving the information thereof, the other half to the use of the United States.

SEC. 4. *And be it further enacted*, That, in order to the registry of any ship or vessel, an oath or affirmation shall be taken and subscribed by the owner, or by one of the owners thereof, before the officer authorized to make such registry, who is hereby empowered to administer the same, declaring, according to the best of the knowledge and belief of the person so swearing or affirming, the name of such ship or vessel, her burden, the place where she was built, if built within the United States, and the year in which she was built; and if built within the United States, before the said sixteenth day of May, one thousand seven hundred and eighty-nine, that she was then owned wholly, or in part, by a citizen or citizens of the United States; and if not built within the said States, that she was, on the said sixteenth day of May, and ever since, hath continued to be, the entire property of a citizen or citizens of the United States; or that she was, at some time posterior to the time when the act shall take effect (specifying the said time), captured in war by a citizen or citizens of the said States, and lawfully condemned as prize (producing a copy of the sentence of condemnation, authenticated in the usual form) or that she has been adjudged to be forfeited for a breach of the laws of the United States (producing a like copy of the sentence whereby she shall have been so adjudged), and declaring his or her name and place of abode, and if he or she be the sole owner of the said ship or vessel that such is the case; or if there be another owner or other owners, that there is or are such other owner or owners, specifying his, her, or their name or names, and place or places of abode, and that he, she, or they, as the case may be, so swearing or affirming, is or are citizens of the United States; and where

an owner resides in a foreign country, in the capacity of a consul of the United States, or as an agent for, and a partner in, a house or copartnership, consisting of citizens of the United States, and actually carrying on trade within the United States, that such is the case, and that there is no subject or citizen of any foreign prince or State, directly, or indirectly, by way of trust, confidence, or otherwise, interested in such ship or vessel, or in the profits, or issues thereof; and that the master, or commander thereof is a citizen, naming the said master, or commander, and stating the means whereby, or manner in which, he is so a citizen. And in case, any of the matters of fact, in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person, by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath, or affirmation, instead of the said owner, touching his being a citizen, and the means whereby, or manner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars: *And provided further*, That in the case of a ship or vessel, built within the United States prior to the sixteenth day of May aforesaid, which was not then owned by a citizen or citizens of the United States, but which, by virtue of a transfer to such citizen or citizens, shall have been registered, pursuant to the act before mentioned, the oath or affirmation, hereby required, shall and may be varied, according to the truth of the case, as often as it shall be requisite to grant a new register for such ship or vessel.

Sec. 5. *And be it further enacted*, That it shall be the duty of every owner, resident within the United States, of any ship or vessel, to which a certificate of registry may be granted (in case there be more than one such owner), to transmit to the collector, who may have granted the same, a like oath or affirmation with that hereinbefore directed to be taken and subscribed by the owner, on whose application such certificate shall have been granted, and within ninety days after the same may have been so granted; which oath or affirmation may, at the option of the party, be taken and subscribed either before the said collector, or before the collector of some other district, or a judge of the supreme, or a district court of the United States, or of a superior court of original jurisdiction of some one of the States. And if such oath or affirmation shall not be taken,

subscribed, and transmitted, as is herein required, the certificate of registry, granted to such ship or vessel, shall be forfeit and void.

Sec. 6. *And be it further enacted*, That before any ship or vessel shall be registered, she shall be measured by a surveyor, if there be one, or by the person he shall appoint, at the port or place where the said ship or vessel may be, and if there be none, by such person as the collector of the district, within which she may be, shall appoint, according to the rule prescribed by the forty-third section of the act, intituled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise, imported into the United States, and on the tonnage of ships or vessels." And the officer, or person, by whom such admeasurement shall be made, shall, for the information of, and as a voucher to the officer by whom the registry is to be made, grant a certificate, specifying the built of such ship or vessel, her number of decks and masts, her length, breadth, depth, the number of tons she measures, and such other particulars as are usually descriptive of the identity of a ship or vessel; and that her name, and the place to which she belongs, are painted on her stern, in manner required by the third section of this act: which certificate shall be countersigned by an owner, or by the master of such ship or vessel, or by some other person who shall attend her admeasurement, on behalf of her owner or owners, in testimony of the truth of the particulars therein contained; without which, the said certificate shall not be valid. But in all cases, where a ship or vessel has before been registered, as a ship or vessel of the United States, it shall not be necessary to measure her anew, for the purpose of obtaining another register; except such ship or vessel shall have undergone some alteration, as to her burden, subsequent to the time of her former registry.

Sec. 7. *And be it further enacted*, That, previous to the registry of any ship or vessel, the husband or acting and managing owner, together with the master thereof, and one or more sureties, to the satisfaction of the collector of the district, whose duty it is to make such registry, shall become bound to the United States, if such ship or vessel shall be of burden not exceeding fifty tons, in the sum of four hundred dollars; if of burden above fifty tons, and not exceeding one hundred, in the sum of eight hundred dollars; if of burden above one hundred tons, and not exceeding two hundred, in the sum of twelve hundred dollars; if of burden above two hundred tons, and not exceeding three hundred, in the sum of sixteen hundred dollars; and if of burden exceeding three hundred tons, in the sum of two thousand dollars; with condition, in each case, that the certificate of such registry, shall be solely used for the ship or vessel, for which it is granted, and shall not be sold, lent, or otherwise disposed of, to any person or persons whomsoever; and that, in case such ship or vessel shall be lost, or taken by an enemy, burnt, or broken up, or shall

be otherwise prevented from returning to the port to which she may belong, the said certificate, if preserved, shall be delivered up, within eight days after the arrival of the master, or person, having the charge or command of such ship or vessel, within any district of the United States, to the collector of such district: and that if any foreigner, or any person or persons, for the use and benefit of such foreigner, shall purchase, or otherwise become entitled to the whole, or any part or share of, or interest in, such ship or vessel, the same being within a district of the United States, the said certificate shall, in such case, within seven days after such purchase, change, or transfer of property, be delivered up to the collector of the said district; and that if any such purchase, change, or transfer of property, shall happen, when such ship or vessel shall be at any foreign port or place, or at sea, then the said master, or person having the charge or command thereof, shall, within eight days after his arrival within any district of the United States, deliver up the said certificate to the collector of such district; and every such certificate, so delivered up, shall be forthwith transmitted to the register of the treasury, to be cancelled, who, if the same shall have been delivered up to a collector, other than of the district in which it was granted, shall cause notice of such delivery to be given to the collector of the said district.

SEC. 8. *And be it further enacted*, That in order to the registry of any ship or vessel, which, after the last day of March next, shall be built within the United States, it shall be necessary to produce a certificate, under the hand of the principal or master carpenter, by whom, or under whose direction, the said ship or vessel shall have been built, testifying, that she was built by him, or under his direction, and specifying the place where, the time when, and the person or persons for whom, and describing her built, number of decks and masts, length, breadth, depth, tonnage, and such other circumstances as are usually descriptive of the identity of a ship or vessel; which certificate shall be sufficient to authorize the removal of a new vessel, from the district where she may be built, to another district in the same, or an adjoining State, where the owner or owners actually reside, provided it be with ballast only.

SEC. 9. *And be it further enacted*, That the several matters hereinbefore required, having been complied with, in order to the registering of any ship or vessel, the collector of the district comprehending the port to which she shall belong, shall make, and keep, in some proper book, a record or registry thereof, and shall grant an abstract or certificate of such record or registry, as nearly as may be, in the form following:

"In pursuance of an Act of the Congress of the United States of America, entituled 'An act concerning the registering and recording of ships or vessels,' [inserting here the name, occupation, and place of abode of the person by whom the oath or affirmation aforesaid, shall have been

made,] having taken or subscribed the oath (or affirmation) required by the said act, and having sworn (or affirmed) that he (or she, and if more than one owner, adding the words, 'together with,' and the name or names, occupation or occupations, place or places of abode, of the other owner or owners) is (or are) the only owner (or owners) of the ship or vessel, called the [inserting here her name] of [inserting here the port to which she may belong] whereof [inserting here the name of the master] is at present master, and is a citizen of the United States, and that the said ship or vessel was [inserting here, when and where built] and [inserting here, the name and office, if any, of the person by whom she shall have been surveyed or admeasured] having certified that the said ship or vessel has [inserting here, the number of decks] and [inserting here, the number of masts] and that her length is [inserting here, the number of feet] her breadth [inserting here, the number of feet] her depth [inserting here, the number of feet] and that she measures [inserting here, her number of tons] that she is [describing here, the particular kind of vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else, together with her built, and specifying whether she has any, or no gallery or head] and the said [naming the owner, or the master, or other person, acting in behalf of the owner or owners, by whom the certificate of admeasurement shall have been countersigned, as aforesaid] having agreed to the description and admeasurement, above specified, and sufficient security having been given, according to the said act, the said ship or vessel has been duly registered at the port of [naming the port where registered]. Given under my hand and seal, at [naming the said port] this [inserting the particular day] day of [naming the month] in the year [specifying the number of the year, in words at length;"] *Provided*, That if the master, or person having the charge or command of such ship or vessel, shall, himself, have made oath or affirmation touching his being a citizen, the wording of the said certificate shall be varied so as to be conformable to the truth of the case: *And provided*, That where a new certificate of registry is granted, in consequence of any transfer of a ship or vessel, the words shall be so varied, as to refer to the former certificate of registry, for her admeasurement.

Sec. 10. *And be it further enacted*, That it shall be the duty of the secretary of the treasury, to cause to be prepared, and transmitted, from time to time, to the collectors of the several districts, a sufficient number of forms of the said certificates of registry, attested under the seal of the treasury, and the hand of the register thereof, with proper blanks, to be filled by the said collectors, respectively, by whom also, the said certificate shall be signed and sealed, before they shall be issued; and where there is a naval officer at any port, they shall be countersigned by him; and where there is a surveyor, but no naval officer, they shall be counter-

signed by him; and a copy of each, shall be transmitted to the said register, who shall cause a record to be kept of the same.

Sec. 11. *And be it further enacted*, That where any citizen or citizens of the United States, shall purchase, or become owner or owners of any ship or vessel, entitled to be registered, by virtue of this act, such ship or vessel, being within any district, other than the one, in which he or they usually reside, such ship or vessel shall be entitled to be registered by the collector of the district, where such ship or vessel may be, at the time of his or their becoming owner or owners thereof, upon his or their complying with the provisions hereinbefore prescribed, in order to the registry of ships or vessels: and the oath or affirmation which is required to be taken, may, at the option of such owner or owners, be taken, either before the collector of the district, comprehending the port to which such ship or vessel may belong, or before the collector of the district, within which, such ship or vessel may be, either of whom, is hereby empowered to administer the same: *Provided nevertheless*, That whenever such ship or vessel shall arrive within the district comprehending the port to which such ship or vessel shall belong, the certificate of registry, which shall have been obtained, as aforesaid, shall be delivered up to the collector of such district, who, upon the requisites of this act, in order to the registry of ships or vessels, being complied with, shall grant a new one, in lieu of the first; and the certificate, so delivered up, shall forthwith be returned by the collector who shall receive the same, to the collector who shall have granted it: and if the said first mentioned certificate of registry, shall not be delivered up, as above directed, the owner or owners, and the master of such ship or vessel, at the time of her said arrival within the district comprehending the port to which such ship or vessel may belong, shall, severally, forfeit the sum of one hundred dollars, to be recovered, with costs of suit; and the said certificate of registry shall be thenceforth void. And in case, any of the matters of fact, in the said oath or affirmation alleged, which shall be within the knowledge of the party, so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath or affirmation, instead of the said owner, touching his being a citizen, and the means whereby, or manner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he

shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars.

Sec. 12. *And be it further enacted*, That when any ship or vessel, entitled to be registered, pursuant to this act, shall be purchased by an agent or attorney for, or on account of a citizen or citizens of the United States, such ship or vessel, being in a district of the United States, more than fifty miles distant, taking the nearest usual route by land, from the one comprehending the port to which, by virtue of such purchase, and by force of this act, such ship or vessel ought to be deemed to belong, it shall be lawful for the collector of the district, where such ship or vessel may be, and he is hereby required, upon the application of such agent or attorney, to proceed to the registering of the said ship or vessel, the said agent or attorney, first complying, on behalf, and in the stead of, the owner or owners thereof, with the requisites prescribed by this act, in order to the registry of ships or vessels, except, that in the oath or affirmation, which shall be taken by the said agent or attorney, instead of swearing or affirming that he is owner, or an owner of such ship or vessel, he shall swear or affirm, that he is agent or attorney for the owner or owners thereof, and that he hath *bonâ fide* purchased the said ship or vessel, for the person or persons, whom he shall name and describe as the owner or owners thereof: *Provided nevertheless*, That whenever such ship or vessel shall arrive within the district comprehending the port to which such ship or vessel shall belong, the certificate of registry, which shall have been obtained, as aforesaid, shall be delivered up to the collector of such district, who, upon the requisites of this act, in order to the registry of ships or vessels, being complied with, shall grant a new one, in lieu of the first; and the certificate, so delivered up, shall forthwith be returned by the collector, who shall transmit the same to the collector who shall have granted it. And if the said first mentioned certificate of registry, shall not be delivered up, as above directed, the owner or owners, and the master of such ship or vessel, at the time of her said arrival within the district comprehending the port to which she may belong, shall, severally, forfeit the sum of one hundred dollars, to be recovered, with costs of suit, and the said certificate of registry shall be thenceforth void. And in case any of the matters of fact, in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he

shall, himself, make oath or affirmation, instead of the said agent or attorney, touching his being a citizen, and the means whereby, or manner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars.

SEC. 13. *And be it further enacted*, That if the certificate of the registry of any ship or vessel shall be lost or destroyed, or mislaid, the master, or other person having the charge or command thereof, may make oath or affirmation, before the collector of the district where such ship or vessel shall first be, after such loss, destruction, or mislaying, who is hereby authorized to administer the same, which oath or affirmation shall be of the form following: "I (inserting here the name of the person swearing or affirming) being master (or having the charge or command) of the ship or vessel, called the (inserting the name of the vessel) do swear (or affirm) that the said ship or vessel, hath been, as I verily believe, registered, according to law, by the name of (inserting again the name of the vessel) and that a certificate thereof was granted by the collector of the district of (naming the district, where registered) which certificate has been lost (or destroyed, or unintentionally and by mere accident mislaid, as the case may be), and (except, where the certificate is alleged to have been destroyed) that the same, if found again, and within my power, shall be delivered up to the collector of the district, in which it was granted;" which oath, or affirmation, shall be subscribed by the party making the same, and upon such oath or affirmation being made, and the other requisites of this act, in order to the registry of ships, or vessels, being complied with, it shall be lawful for the collector of the district, before whom such oath or affirmation is made, to grant a new register, inserting therein, that the same is issued, in the room of the one lost or destroyed. But in all cases, where a register shall be granted, in lieu of the one lost or destroyed, by any other than the collector of the district, to which the ship, or vessel actually belongs, such register shall, within ten days after her first arrival within the district to which she belongs, be delivered up to the collector of the said district, who shall, thereupon, grant a new register, in lieu thereof. And in case the master, or commander shall neglect to deliver up such register within the time aforesaid, he shall forfeit one hundred dollars; and the former register shall become null and void.

SEC. 14. *And be it further enacted*, That when any ship or vessel, which shall have been registered, pursuant to this act, or the act hereby, in part, repealed, shall, in whole, or in part, be sold, or transferred to a citizen or citizens of the United States, or shall be altered in form or

burden, by being lengthened, or built upon, or from one denomination to another, by the mode or method of rigging or fitting, in every such case, the said ship or vessel shall be registered anew, by her former name, according to the directions herein before contained (otherwise she shall cease to be deemed a ship or vessel of the United States), and her former certificate of registry shall be delivered up to the collector to whom application for such new registry shall be made, at the time, that the same shall be made to be by him transmitted to the register of the treasury, who shall cause the same to be cancelled. And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew. And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States. And further, if her said former certificate of registry shall not be delivered up as aforesaid, except where the same may have been destroyed, lost, or unintentionally mislaid, and an oath or affirmation thereof shall have been made, as aforesaid, the owner or owners of such ship or vessel shall forfeit and pay the sum of five hundred dollars, to be recovered with costs of suit.

Sec. 15. *And be it further enacted*, That when the master, or person having the charge or command of a ship or vessel, registered pursuant to this act, or the act hereby in part repealed, shall be changed, the owner, or one of the owners, or the new master of such ship or vessel, shall report such change to the collector of the district where the same shall happen, or where the said ship or vessel shall first be, after the same shall have happened, and shall produce to him the certificate of registry of such ship or vessel, and shall make oath or affirmation, showing that such new master is a citizen of the United States, and the manner in which, or means whereby, he is so a citizen; whereupon the said collector shall indorse upon the said certificate of registry, a memorandum of such change, specifying the name of such new master, and shall subscribe the said memorandum with his name, and if other than the collector of the district, by whom the said certificate of registry shall have been granted, shall transmit a copy of the said memorandum to him, with notice of the particular ship or vessel, to which it shall relate; and the collector of the district, by whom the said certificate shall have been granted, shall make a like memorandum of such change, in his book of registers, and shall transmit a copy thereof, to the register of the treasury. And if the said change shall not be reported, or if the said oath or affirmation shall not be taken, as above directed, the registry of such ship or vessel shall be void, and the said master, or person, having the

charge or command of her shall forfeit and pay the sum of one hundred dollars.

Sec. 16. *And be it further enacted*, That if any ship or vessel, heretofore registered, or which shall hereafter be registered, as a ship or vessel of the United States, shall be sold or transferred, in whole or in part by way of trust, confidence or otherwise, to a subject or citizen of any foreign prince or State, and such sale or transfer shall not be made known, in manner herein before directed, such ship or vessel, together with her tackle, apparel, and furniture shall be forfeited. *Provided*, That if such ship or vessel shall be owned in part only, and it shall be made to appear to the jury, before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to, or ownership of, such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to such forfeiture; and the residue only shall be so forfeited.

Sec. 17. *And be it further enacted*, That upon the entry of every ship or vessel of the United States, from any foreign port or place, if the same shall be at the port or place, at which the owner, or any of the part-owners reside, such owner or part-owner shall make oath or affirmation, that the register of such ship or vessel contains the name or names of all the persons, who are then owners of the said ship or vessel; or if any part of such ship or vessel has been sold or transferred, since the granting of such register, that such is the case, and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by the way of trust, confidence, or otherwise, in such ship or vessel. And if the owner, or any part-owner, shall not reside at the port or place, at which such ship or vessel shall enter, then the master or commander shall make oath or affirmation, to the like effect. And if the owner, or part-owner, where there is one, or the master or commander, where there is no owner, shall refuse to swear or affirm as aforesaid, such ship or vessel shall not be entitled to the privileges of a ship or vessel of the United States.

Sec. 18. *And be it further enacted*, That in all cases, where the master, commander, or owner of a ship or vessel, shall deliver up the register of such ship or vessel, agreeable to the provisions of this act, if to the collector of the district, where the same shall have been granted, the said collector shall, thereupon, cancel the bond, which shall have been given at the time of granting such register; or, if to the collector of any other district, such collector shall grant to the said master, commander, or owner, a receipt or acknowledgment, that such register has been delivered to him, and the time, when; and upon such receipt being produced to the collector, by whom the register was granted, he shall

cancel the bond of the party, as if the register had been returned to him.

SEC. 19. *And be it further enacted*, That the collector of each district shall progressively number the certificates of the registry by him granted, beginning anew, at the commencement of each year, and shall enter an exact copy of each certificate, in a book to be kept for that purpose; and shall, once in three months, transmit to the register of the treasury, copies of all the certificates, which shall have been granted by him, including the number of each.

SEC. 20. *And be it further enacted*, That every ship or vessel, built in the United States, after the fifteenth day of August, one thousand seven hundred and eighty-nine, and belonging wholly, or in part, to the subjects of foreign powers, in order to be entitled to the benefits of a ship, built and recorded in the United States, shall be recorded in the office of the collector of the district, in which such ship or vessel was built, in manner following, that is to say: The builder of every such ship or vessel shall make oath or affirmation, before the collector of such district, who is hereby authorized to administer the same, in manner following: "I (inserting here the name of such builder) of (inserting here the place of his residence) shipwright, do swear (or affirm) that (describing here the kind of vessel, and whether ship, brig, snow, schooner, sloop, or whatever else) named (inserting here the name of the ship or vessel) having (inserting here the number of decks) and being, in length (inserting here the number of feet) in breadth (inserting here the number of feet) in depth (inserting here the number of feet) and measuring (inserting here the number of tons) having (specifying, whether any or no) gallery, and (also specifying, whether any or no) head, was built by me, or under my direction, at (naming the place, county, and State) in the United States, in the year (inserting here the number of the year;") which oath or affirmation shall be subscribed by the person making the same, and shall be recorded in a book, to be kept, by the said collector, for that purpose.

SEC. 21. *And be it further enacted*, That the said collector shall cause the said ship or vessel to be surveyed or admeasured, according to the rule, prescribed by the forty-third section of the act, intituled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise, imported into the United States, and on the tonnage of ships or vessels;" and the person, by whom such admeasurement shall be made, shall grant a certificate thereof, as in the case of a ship or vessel to be registered; which certificate shall be countersigned by the said builder, and by an owner, or the master, or person having the command or charge thereof, or by some other person, being

an agent for the owner or owners thereof, in testimony of the truth of the particulars therein contained.

SEC. 22. *And be it further enacted*, That a certificate of the said record, attested under the hand and seal of the said collector, shall be granted to the master of every such ship or vessel, as nearly as may be, of the form following: "In pursuance of an act, intituled 'An act concerning the registering and recording of ships or vessels,' I (inserting here the name of the collector of the district) of (inserting here the name of the district) in the United States, do certify, that (inserting here the name of the builder) of (inserting here the place of his residence, county, and State) having sworn, or affirmed, that the (describing the ship or vessel, as in the certificate of record) named (inserting here her name) whereof (inserting here the name of the master) is, at present, master, was built at (inserting here the name of the place, county, and State, where built) by him, or under his direction, in the year (inserting here the number of the year) and (inserting here the name of the surveyor, or other person, by whom the same admeasurement shall have been made) having certified, that the said ship or vessel has (inserting here her number of decks) is, in length (inserting here the number of feet) in breadth (inserting here the number of feet) in depth (inserting here the number of feet) and measures (inserting here the number of tons): And the said builder and (naming and describing the owner, or master, or agent for the owner or owners, as the case may be, by whom the said certificate shall have been countersigned) having agreed to the said description and admeasurement, the said ship or vessel has been recorded, in the district of (inserting here the name of the district, where recorded) in the United States: Witness my hand and seal, this (inserting here the day of the month) day of (inserting here the name of the month) in the year (inserting here the number of the year);" which certificate shall be recorded in the office of the said collector, and a duplicate thereof transmitted to the register of the treasury of the United States, to be recorded in his office.

SEC. 23. *And be it further enacted*, That if the master, or the name, of any ship or vessel so recorded, shall be changed, the owner, part-owner, or consignee of such ship or vessel, shall cause a memorandum thereof to be indorsed on the certificate of the record, by the collector of the district, where such ship or vessel may be, or at which she shall first arrive, if such change took place in a foreign country; and a copy thereof shall be entered in the book of records, a transcript whereof shall be transmitted, by the said collector, to the collector of the district, where such certificate was granted (if not the same person), who shall enter the same in his book of records, and forward a duplicate of such

entry, to the register of the treasury of the United States; and in such case, until the said owner, part-owner, or consignee, shall cause the said memorandum to be made, by the collector, in manner aforesaid, such ship or vessel shall not be deemed, or considered, as a vessel recorded, in pursuance of this act.

SEC. 24. *And be it further enacted*, That the master, or other person having the command or charge of any ship or vessel, recorded in pursuance of this act, shall, on entry of such ship or vessel, produce the certificate of such record, to the collector of the district, where she shall be so entered; in failure of which, the said ship or vessel shall not be entitled to the privileges of a vessel, recorded as aforesaid: *Provided always, and be it further enacted*, That nothing herein contained shall be construed to make it necessary to record, a second time, any ship or vessel, which shall have been recorded, pursuant to the act, hereby in part repealed: but such recording shall be of the like force and effect, as if made pursuant to this act.

SEC. 25. *And be it further enacted*, That the fees and allowances, for the several services to be performed, pursuant to this act, and the distribution of the same, shall be as follows, to wit: For the admeasurement of every ship or vessel, of one hundred tons, and under, one cent per ton; for the admeasurement of every ship or vessel, above one hundred, and not exceeding two hundred tons, one hundred and fifty cents; for the admeasurement of every ship or vessel, above two hundred tons, two hundred cents; for every certificate of registry or record, two hundred cents; for every indorsement upon a certificate of registry or record, one hundred cents; and for taking every bond required by this act, twenty-five cents. The whole amount of which fees shall be received, and accounted for, by the collector, or, at his option, by the naval officer, where there is one; and where there is a collector, naval officer, and surveyor, shall be equally divided, monthly, between the said officers; and where there is no naval officer, two thirds to the collector, and the other third to the surveyor; and where there is only a collector, he shall receive the whole amount thereof; and where there is more than one surveyor in any district, each of them shall receive his proportionable part of such fees, as shall arise in the port, for which he is appointed: *Provided always*, that in all cases where the tonnage of any ship or vessel shall be ascertained, by any person appointed for that purpose, such person shall be paid a reasonable compensation therefor, out of the fees aforesaid, before any distribution thereof, as aforesaid. And every collector, and naval officer, and every surveyor, who shall reside at a port where there is no collector, shall cause to be affixed, and constantly kept, in some conspicuous part of his office, a fair table of the rates of fees, demandable by this act.

Sec. 26. *And be it further enacted*, That every collector, or officer, who shall knowingly make, or be concerned in making any false register or record, or shall knowingly grant, or be concerned in granting, any false certificate of registry or record of, or for any ship or vessel, or other false document whatsoever, touching the same, contrary to the true intent and meaning of this act, or who shall designedly take any other, or greater fees, than are by this act allowed, or who shall receive any voluntary reward or gratuity, for any of the services performed, pursuant thereto; and every surveyor, or other person appointed to measure any ship or vessel, who shall wilfully deliver to any collector, or naval officer, a false description of such ship or vessel, to be registered or recorded, shall, upon conviction of any such neglect, or offence, forfeit the sum of one thousand dollars, and be rendered incapable of serving in any office of trust or profit, under the United States; and if any person or persons, authorized and required by this act, in respect to his or their office or offices, to perform any act or thing, required to be done or performed, pursuant to any of the provisions of this act, shall wilfully neglect to do or perform the same, according to the true intent and meaning of this act, such person or persons shall, on being duly convicted thereof, if not subject to the penalty and disqualification aforesaid, forfeit the sum of five hundred dollars for the first offence, and a like sum for the second offence, and shall, thenceforth, be rendered incapable of holding any office of trust or profit under the United States.

Sec. 27. *And be it further enacted*, That if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel, and furniture.

Sec. 28. *And be it further enacted*, That if any person or persons shall falsely make oath or affirmation, to any of the matters, herein required to be verified, such person or persons shall suffer the like pains and penalties, as shall be incurred by persons committing wilful and corrupt perjury; and that if any person or persons shall forge, counterfeit, erase, alter, or falsify any certificate, register, record, or other document, mentioned, described, or authorized, in and by this act, such person, or persons, shall, for every such offence, forfeit the sum of five hundred dollars.

Sec. 29. *And be it further enacted*, That all the penalties and forfeitures, which may be incurred, for offences against this act, shall and may be sued for, prosecuted, and recovered, in such courts, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offences against the act, intituled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and

merchandise, imported into the United States, and on the tonnage of ships or vessels," may be legally sued for, prosecuted, recovered, and disposed of: *Provided always*, That if any officer entitled to a part or share of any such penalty or forfeiture, shall be necessary as a witness, on the trial for such penalty or forfeiture, such officer may be a witness upon the said trial; but in such a case, he shall not receive, nor be entitled to any part or share of the said penalty or forfeiture; and the part or share, to which he would otherwise have been entitled, shall accrue to the United States.

SEC. 30. *And be it further enacted*, That from and after the last day of March next, this act shall be in full force and effect; and so much of the act, intituled "An act for registering and clearing vessels, regulating the coasting-trade, and for other purposes," as comes within the purview of this act, shall, after the said last day of March, be repealed.

ACT OF 1793, CHAPTER VIII. (1 U. S. Stats. at Large, 305).

An Act for enrolling and licensing Ships or Vessels to be employed in the Coasting Trade and Fisheries, and for regulating the same.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That ships or vessels, enrolled by virtue of "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and those of twenty tons and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a license in force, or if less than twenty tons, not being enrolled, shall have a license in force, as is hereinafter required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.

SEC. 2. *And be it further enacted*, That from and after the last day of May next, in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are made necessary for registering ships or vessels, by the act, intituled "An act concerning the registering and recording of ships or vessels," and the same duties and authorities are hereby given and imposed on all officers, respectively, in relation to such enrolments, and the same proceedings shall be had, in similar cases, touching such enrolments; and the ships or vessels so enrolled, with the master, or owner or owners thereof, shall be subject to the same requisites, as are in those respects provided for vessels registered by virtue of the aforesaid act; the record of which enrolment shall be made, and an ab-

stract or copy thereof granted, as nearly as may be, in the form following: "Enrolment in conformity to an act of the Congress of the United States of America, intituled 'An act for enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same,' [inserting here, the name of the person, with his occupation and place of abode, by whom the oath or affirmation is to be made] having taken and subscribed the oath (or affirmation) required by this act, and having sworn (or affirmed) that he (or she, and if more than one owner, adding the words 'together with,' and the name or names, occupation or occupations, place or places of abode, of the owner or owners) is (or are) a citizen (or citizens) of the United States, and sole owner (or owners) of the ship or vessel, called the [inserting here her name] of [inserting here the name of the port to which she may belong] whereof [inserting here the name of the master] is at present master, and is a citizen of the United States, and that the said ship or vessel was [inserting here when and where built] and [inserting here the name and office, if any, of the person by whom she shall have been surveyed, or admeasured] having certified, that the said ship or vessel has [inserting here the number of decks] and [inserting here the number of masts] and that her length is [inserting here the number of feet] her breadth [inserting here the number of feet] her depth [inserting here the number of feet] and that she measures [inserting here her number of tons] that she is [describing here the particular kind of vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else, together with her built, and specifying, whether she has any or no gallery or head] and the said [naming the owner, or the master, or other person acting in behalf of the owner or owners, by whom the certificate of admeasurement shall have been countersigned] having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said ship or vessel has been duly enrolled, at the port of [naming the port where enrolled]. Given under my hand and seal, at [naming the said port], this [inserting the particular day] of [naming the month] in the year [specifying the number of the year, in words at length]."

Sec. 3. *And be it further enacted*, That it shall and may be lawful for the collectors of the several districts, to enroll and license any ship or vessel, that may be registered, upon such registry being given up, or to register any ship or vessel, that may be enrolled, upon such enrolment and license being given up. And when any ship or vessel shall be in any other district than the one to which she belongs, the collector of such district, on the application of the master or commander thereof, and upon his taking an oath or affirmation, that according to his best knowledge and belief, the property remains, as expressed in the register or enrolment proposed to be given up, and upon his giving the bonds required for grant-

ing registers, shall make the exchanges aforesaid; but in every such case, the collector, to whom the register, or enrolment and license may be given up, shall transmit the same to the register of the treasury; and the register, or enrolment and license, granted in lieu thereof, shall, within ten days after the arrival of such ship or vessel within the district, to which she belongs, be delivered to the collector of the said district, and be by him cancelled. And if the said master or commander shall neglect to deliver the said register or enrolment and license, within the time aforesaid, he shall forfeit one hundred dollars.

SEC. 4. *And be it further enacted*, That in order to the licensing of any ship or vessel, for carrying on the coasting trade or fisheries, the husband, or managing owner, together with the master thereof, with one or more sureties to the satisfaction of the collector granting the same, shall become bound to pay to the United States, if such ship or vessel be of the burden of five tons, and less than twenty tons, the sum of one hundred dollars; and if twenty tons, and not exceeding thirty tons, the sum of two hundred dollars; and if above thirty tons, and not exceeding sixty tons, the sum of five hundred dollars; and if above sixty tons, the sum of one thousand dollars, in case it shall appear, within two years from the date of the bond, that such ship or vessel has been employed in any trade, whereby the revenue of the United States has been defrauded during the time the license granted to such ship or vessel remained in force; and the master of such ship or vessel shall also swear, or affirm, that he is a citizen of the United States, and that such license shall not be used for any other vessel, or any other employment, than that for which it is specially granted, or in any trade or business, whereby the revenue of the United States may be defrauded; and if such ship or vessel be less than twenty tons burden, the husband or managing owner shall swear or affirm, that she is wholly the property of a citizen or citizens of the United States; whereupon it shall be the duty of the collector of the district comprehending the port, whereto such ship or vessel may belong (the duty of six cents per ton being first paid), to grant a license, in the form following: "License for carrying on the [here insert, coasting trade, whale fishery, or cod fishery, as the case may be].

"In pursuance of an act of the Congress of the United States of America, intituled 'An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same,' [inserting here the name of the husband or managing owner, with his occupation and place of abode, and the name of the master, with the place of his abode] having given bond, that the [insert here the description of the vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else she may be], called the [insert here the vessel's name], whereof the said [naming the master] is master, burden [insert here the number of

tons, in words] tons, as appears by her enrolment, dated at [naming the district, day, month, and year, in words at length, (but if she be less than twenty tons, insert, instead thereof,) proof being had of her admeasurement] shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn (or affirmed) that this license shall not be used for any other vessel, or for any other employment, than is herein specified, license is hereby granted for the said [inserting here the description of the vessel] called the [inserting here the vessel's name] to be employed in carrying on the [inserting here, coasting trade, whale fishery, or cod fishery, as the case may be] for one year from the date hereof, and no longer: Given under my hand and seal, at [naming the said district], this [inserting the particular day] day of [naming the month] in the year [specifying the number of the year in words at length]."

SEC. 5. *And be it further enacted*, That no license, granted to any ship or vessel, shall be considered in force, any longer than such ship or vessel is owned, and of the description set forth in such license, or for carrying on any other business or employment, than that for which she is specially licensed, and if any ship or vessel be found with a forged or altered license, or making use of a license granted for any other ship or vessel, such ship or vessel, with her tackle, apparel, and the cargo found on board her, shall be forfeited.

SEC. 6. *And be it further enacted*, That after the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, or if less than twenty tons, and not less than five tons, without a license, in manner as is provided by this act, such ship or vessel, if laden with goods the growth or manufacture of the United States only (distilled spirits excepted) or in ballast, shall pay the same fees and tonnage in every port of the United States, at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the United States, and if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, the ship or vessel, together with her tackle, apparel, and furniture, and the lading found on board, shall be forfeited: *Provided*, however, if such ship or vessel be at sea, at the expiration of the time for which the license was given, and the master of such ship or vessel shall swear or affirm that such was the case, and shall also within forty-eight hours after his arrival deliver to the collector of the district in which he shall first arrive the license which shall have expired, the forfeiture aforesaid shall not be incurred, nor shall the ship or vessel be liable to pay the fees and tonnage aforesaid.

SEC. 7. *And be it further enacted*, That the collector of each district shall progressively number the licenses by him granted, beginning anew at the commencement of each year, and shall make a record thereof in a book, to be by him kept for that purpose, and shall, once in three months, transmit to the register of the treasury, copies of the licenses, which shall have been so granted by him; and also of such licenses, as shall have been given up or returned to him, respectively, in pursuance of this act. And where any ship or vessel shall be licensed, or enrolled anew, or being licensed or enrolled, shall afterwards be registered, or being registered, shall afterwards be enrolled, or licensed, she shall, in every such case, be enrolled, licensed, or registered by her former name.

SEC. 8. *And be it further enacted*, That if any ship or vessel, enrolled or licensed, as aforesaid, shall proceed on a foreign voyage, without first giving up her enrolment and license, to the collector of the district comprehending the port, from which she is about to proceed on such foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel, and furniture, and the goods, wares, and merchandise, so imported therein, shall be liable to seizure and forfeiture: *Provided always*, if the port, from which such ship or vessel is about to proceed on such foreign voyage, be not within the district, where such ship or vessel is enrolled, the collector of such district shall give to the master of such ship or vessel a certificate, specifying that the enrolment and license of such ship or vessel is received by him, and the time when it was so received; which certificate shall afterwards be delivered by the said master to the collector, who may have granted such enrolment and license.

SEC. 9. *And be it further enacted*, That the license, granted to any ship or vessel, shall be given up to the collector of the district, who may have granted the same, within three days after the expiration of the time, for which it was granted, in case such ship or vessel be then within the district, or if she be absent, at that time, within three days from her first arrival within the district afterwards, or if she be sold out of the district, within three days after the arrival of the master within any district, to the collector of such district, taking his certificate therefor; and if the master thereof shall neglect, or refuse to deliver up the license, as aforesaid, he shall forfeit fifty dollars; but if such license shall have been previously given up to the collector of any other district, as authorized by this act, and a certificate thereof under the hand of such collector, be produced by such master, or if such license be lost, or destroyed, or unintentionally mislaid, so that it cannot be found, and the master of such ship or vessel shall make and subscribe an oath or affirmation, that such license is lost, destroyed, or unintentionally mislaid, as he verily believes, and that the same, if found, shall be delivered up, as is herein required,

then the aforesaid penalty shall not be incurred. And if such license shall be lost, destroyed, or unintentionally mislaid, as aforesaid, before the expiration of the time for which it was granted, upon the like oath or affirmation being made and subscribed by the master of such ship or vessel, the said collector is hereby authorized and required, upon application being made therefor, to license such ship or vessel anew.

Sec. 10. *And be it further enacted*, That it shall and may be lawful for the owner or owners of any licensed ship or vessel, to return such license to the collector who granted the same at any time within the year, for which it was granted, who shall thereupon, cancel the same and shall license such vessel anew, upon the application of the owner or owners, and upon the conditions hereinbefore required, being complied with; and in case the term, for which the former license was granted, shall not be expired, an abatement of the tonnage of six cents per ton shall be made, in the proportion of the time so unexpired.

Sec. 11. *And be it further enacted*, That every licensed ship or vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner as is provided for registered ships or vessels, and if any licensed ship or vessel be found, without such painting, the owner or owners thereof shall pay twenty dollars.

Sec. 12. *And be it further enacted*, That when the master of any licensed ship or vessel, ferry boats excepted, shall be changed, the new master, or, in case of his absence, the owner or one of the owners thereof, shall report such change to the collector residing at the port where the same may happen, if there be one, otherwise, to the collector residing at any port, where such ship or vessel may next arrive, who, upon the oath or affirmation of such new master, or in case of his absence, of the owner or one of the owners, that he is a citizen of the United States, and that such ship or vessel shall not, while such license continues in force, be employed in any manner, whereby the revenue of the United States may be defrauded, shall indorse such change on the license, with the name of the new master; and when any change shall happen, as aforesaid, and such change shall not be reported, and the indorsement made of such change, as is herein required, such ship or vessel, found carrying on the coasting trade or fisheries, shall be subject to pay the same fees and tonnage, as a vessel of the United States, having a register, and the said new master shall forfeit and pay the sum of ten dollars.

Sec. 13. *And be it further enacted*, That it shall be lawful, at all times, for any officer concerned in the collection of the revenue, to inspect the enrolment or license of any ship or vessel; and if the master of any such ship or vessel shall not exhibit the same, when thereunto required by such officer, he shall pay one hundred dollars.

Sec. 14. *And be it further enacted*, That the master or commander of

every ship or vessel licensed for carrying on the coasting trade, destined from a district in one State, to a district in the same, or an adjoining State on the sea-coast, or on a navigable river, having on board, either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, or in bottles exceeding one hundred dozens, sugar in casks or boxes exceeding three thousand pounds, tea in chests or boxes exceeding five hundred pounds, coffee in casks or bags exceeding one thousand pounds, or foreign merchandise in packages, as imported, exceeding in value four hundred dollars, or goods, wares, or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, shall, previous to the departure of such ship or vessel from the port where she may then be, make out and subscribe duplicate manifests of the whole of such cargo on board such ship or vessel, specifying in such manifests, the marks and numbers of every cask, bag, box, chest, or package containing the same, with the name and place of residence of every shipper and consignee, and the quantity shipped by and to each, and if there be a collector or surveyor, residing at such port, or within five miles thereof, he shall deliver such manifests to the collector, if there be one, otherwise to the surveyor, before whom he shall swear or affirm, to the best of his knowledge and belief, that the goods therein contained were legally imported, and the duties thereupon paid or secured, or if spirits distilled within the United States, that the duties thereupon have been paid or secured, whereupon the said collector or surveyor shall certify the same on the said manifests, one of which he shall return to the said master, with a permit, specifying thereon, generally, the lading on board such ship or vessel, and authorizing him to proceed to the port of his destination. And if any ship or vessel, being laden and destined, as aforesaid, shall depart from the port where she may then be, without the master or commander having first made out and subscribed duplicate manifests of the lading on board such ship or vessel, and in case there be a collector or surveyor residing at such port, or within five miles thereof, without having previously delivered the same to the said collector or surveyor, and obtaining a permit, in manner as is herein required, such master or commander shall pay one hundred dollars.

Sec. 15. *And be it further enacted*, That the master or commander of every ship or vessel licensed for carrying on the coasting-trade, having on board, either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, or in bottles exceeding one hundred dozens, sugar in casks or boxes exceeding three thousand pounds, tea in chests or boxes exceeding five hundred pounds, coffee in casks or bags exceeding one thousand pounds, or foreign mer-

chandise in packages, as imported, exceeding in value four hundred dollars, or goods, wares, or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, and arriving from a district in one State, at a district in the same or an adjoining State on the sea-coast, or on a navigable river, shall, previous to the unlading of any part of the cargo of such ship or vessel, deliver to the collector, if there be one, or if not, to the surveyor residing at the port of her arrival, or if there be no collector or surveyor residing at such port, then to a collector or surveyor, if there be any such officer, residing within five miles thereof, the manifest of the cargo, certified by the collector or surveyor of the district from whence she sailed (if there be such manifest), otherwise the duplicate manifests thereof, as is herein before directed, to the truth of which, before such officer, he shall swear or affirm. And if there have been taken on board such ship or vessel, any other or more goods, than are contained in such manifest or manifests, since her departure from the port from whence she first sailed, or if any goods have been since landed, the said master or commander shall make known and particularize the same to the said collector or surveyor, or if no such goods have been so taken on board or landed, he shall so declare, to the truth of which he shall swear or affirm: Whereupon, the said collector or surveyor shall grant a permit for unlading a part, or the whole of such cargo, as the said master or commander may request. And if there be no collector or surveyor, residing at, or within five miles of the said port of her arrival, the master or commander of such ship or vessel may proceed to discharge the lading from on board such ship or vessel, but shall deliver to the collector or surveyor, residing at the first port, where he may next afterwards arrive, and within twenty-four hours of his arrival, the manifest or manifests aforesaid, noting thereon the times when, and places where, the goods therein mentioned have been unladen, to the truth of which, before the said last-mentioned collector or surveyor, he shall swear or affirm; and if the master or commander of any such ship or vessel, being laden as aforesaid, shall neglect or refuse to deliver the manifest or manifests, at the times, and in the manner, herein directed, he shall pay one hundred dollars.

Sec. 16. *And be it further enacted*, That the master or commander of every ship or vessel, licensed for carrying on the coasting-trade, and being destined from any district of the United States, to a district other than a district in the same, or an adjoining State, on the sea-coast, or on a navigable river, shall, previous to her departure, deliver to the collector residing at the port where such ship or vessel may be, if there is one, otherwise to the collector of the district comprehending such port, or to a surveyor within the district, as the one or the other may reside

nearest to the port at which such ship or vessel may be, duplicate manifests of the whole cargo on board such ship or vessel, or if there be no cargo on board, he shall so certify, and if there be any distilled spirits, or goods, wares, and merchandise, of foreign growth or manufacture on board, other than what may, by the collector, be deemed sufficient for sea stores, he shall specify in such manifests, the marks and numbers of every cask, bag, box, chest, or package, containing the same, with the name, and place of residence, of every shipper and consignee of such distilled spirits, or goods of foreign growth or manufacture, and the quantity shipped by, and to each, to be by him subscribed, and to the truth of which he shall swear or affirm; and shall also swear or affirm before the said collector or surveyor, that such goods, wares, or merchandise, of foreign growth or manufacture, were, to the best of his knowledge and belief, legally imported, and the duties thereupon paid or secured; or if spirits distilled within the United States, that the duties thereupon have been duly paid or secured; upon the performance of which, and not before, the said collector or surveyor shall certify the same on the said manifests; one of which he shall return to the master, with a permit, thereto annexed, authorizing him to proceed to the port of his destination. And if any such ship or vessel shall depart from the port where she may then be, having distilled spirits, or goods, wares, or merchandise, of foreign growth or manufacture on board, without the several things herein required, being complied with, the master thereof shall forfeit one hundred dollars; or if the lading be of goods, the growth or manufacture of the United States only, or if such ship or vessel have no cargo, and she depart, without the several things herein required, being complied with, the said master shall forfeit and pay fifty dollars.

Sec. 17. *And be it further enacted*, That the master or commander of every ship or vessel, licensed to carry on the coasting trade, arriving at any district of the United States, from any district, other than a district in the same, or an adjoining State on the sea-coast, or on a navigable river, shall deliver to the collector residing at the port where she may arrive, if there be one, otherwise to the collector or surveyor in the district comprehending such port, as the one, or the other, may reside nearest thereto, if the collector or surveyor reside at a distance not exceeding five miles, within twenty-four hours, or if at a greater distance, within forty-eight hours next after his arrival; and previous to the unlading any of the goods brought in such ship or vessel, the manifest of the cargo (if there be any) certified by the collector or surveyor of the district from whence she last sailed, and shall make oath or affirmation, before the said collector or surveyor, that there was not when he sailed from the district where his manifest was certified, or has been since, or then is, any more, or other goods, wares, or merchandise of foreign

growth or manufacture, or distilled spirits (if there be any, other than sea stores, on board such vessel) than is therein mentioned; and if there be no such goods, he shall so swear or affirm; and if there be no cargo on board, he shall produce the certificate of the collector or surveyor of the district from whence she last sailed, as aforesaid, that such is the case: Whereupon such collector or surveyor shall grant a permit for unlading the whole, or part of such cargo (if there be any) within his district, as the master may request; and where a part only of the goods, wares, and merchandise, of foreign growth or manufacture, or of distilled spirits, brought in such ship or vessel, is intended to be landed, the said collector or surveyor shall make an indorsement of such part, on the back of the manifest, specifying the articles to be landed; and shall return such manifest to the master, indorsing also thereon, his permission for such ship or vessel to proceed to the place of her destination; and if the master of such ship or vessel shall neglect or refuse to deliver the manifest (or if she has no cargo, the certificate), within the time herein directed, he shall forfeit one hundred dollars, and the goods, wares, and merchandise of foreign growth or manufacture, or distilled spirits, found on board, or landed from such ship or vessel, not being certified, as is herein required, shall be forfeited, and if the same shall amount to the value of eight hundred dollars, such ship or vessel, with her tackle, apparel, and furniture, shall be also forfeited.

Sec. 18. *And be it further enacted*, That nothing in this act contained shall be so construed, as to oblige the master or commander of any ship or vessel, licensed for carrying on the coasting-trade, bound from a district in one State, to a district in the same, or an adjoining State on the sea-coast, or on a navigable river, having on board goods, wares, or merchandise, of the growth, product, or manufactures of the United States only (except distilled spirits) or distilled spirits, not more than five hundred gallons, wine in casks not more than two hundred and fifty gallons, or in bottles not more than one hundred dozens, sugar in casks or boxes not more than three thousand pounds, tea in chests or boxes not more than five hundred pounds, coffee in casks or bags not more than one thousand pounds, or foreign merchandise in packages, as imported, of not more value than four hundred dollars, or goods, wares, or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value shall be not more than eight hundred dollars, to deliver a manifest thereof, or obtain a permit, previous to her departure, or on her arrival within such district, to make any report thereof; but such master shall be provided with a manifest, by him subscribed, of the lading, of what kind soever, which was on board such ship or vessel, at the time of his departure from the district from which she last sailed, and if the same, or any part of such lading,

consists of distilled spirits, or goods, wares, or merchandise, of foreign growth or manufacture, with the marks and numbers of each cask, bag, box, chest, or package, containing the same, with the name of the shipper and consignee of each; which manifest shall be by him exhibited, for the inspection of any officer of the revenue, when, by such officer, thereunto required; and shall also inform such officer, from whence such ship or vessel last sailed, and how long she has been in port, when by him so interrogated. And if the master of such ship or vessel shall not be provided, on his arrival within any such district, with a manifest, and exhibit the same, as is herein required, if the lading of such ship or vessel consist wholly of goods, the produce or manufacture of the United States (distilled spirits excepted) he shall forfeit twenty dollars, or if there be distilled spirits, or goods, wares, or merchandise, of foreign growth or manufacture, on board, excepting what may be sufficient for sea stores, he shall forfeit forty dollars; or if he shall refuse to answer the interrogatories truly, as is herein required, he shall forfeit the sum of one hundred dollars. And if any of the goods laden on board such ship or vessel, shall be of foreign growth or manufacture, or of spirits distilled within the United States, so much of the same as may be found on board such ship or vessel, and which shall not be included in the manifest exhibited by such master, shall be forfeited.

SEC. 19. *And be it further enacted*, That it shall and may be lawful for the collector of the district of Pennsylvania, to grant permits for the transportation of goods, wares, or merchandise, of foreign growth or manufacture, across the State of New Jersey, to the district of New York, or across the State of Delaware, to any district in the State of Maryland or Virginia; and for the collector of the district of New York, to grant like permits for the transportation across the State of New Jersey; and for the collector of any district of Maryland or Virginia, to grant like permits for the transportation across the state of Delaware, to the district of Pennsylvania: *Provided*, That every such permit shall express the name of the owner, or person sending such goods, and of the person or persons, to whom such goods shall be consigned, with the marks, numbers, and description of the packages, whether bale, box, chest, or otherwise, and the kind of goods contained therein, and the date, when granted; and the owner, or person sending such goods, shall swear or affirm, that they were legally imported, and the duties thereupon paid or secured: *And provided also*, That the owner or consignee of all such goods, wares, and merchandise, shall, within twenty-four hours after the arrival thereof, at the place to which they were permitted to be transported, report the same, to the collector of the district where they shall so arrive, and shall deliver up the permit accompanying the same, and if the owner or consignee aforesaid, shall neglect or refuse to make due entry of such goods,

within the time, and in the manner, herein directed, all such goods, wares, and merchandise, shall be subject to forfeiture; and if the permit granted shall not be given up, within the time limited for making the said report, the person or persons to whom it was granted, neglecting or refusing to deliver it up, shall forfeit fifty dollars for every twenty-four hours it shall be withheld afterwards: *Provided*, That where the goods, wares, and merchandise, to be transported in manner aforesaid, shall be of less value than eight hundred dollars, the said oath and permit shall not be deemed necessary, nor shall the owner or consignee be obliged to make report to the collector of the district where the said goods, wares, and merchandise shall arrive.

SEC. 20. *And be it further enacted*, That when any ship or vessel of the United States, registered according to law, shall be employed in going from any one district in the United States, to any other district, such ship or vessel, and the master or commander thereof, with the goods she may have on board, previous to her departure from the district, where she may be, and also, upon her arrival in any other district, shall be subject (except as to the payment of fees) to the same regulations, provisions, penalties, and forfeitures, and the like duties are imposed on like officers, as is provided by the sixteenth and seventeenth sections of this act, for ships or vessels licensed for carrying on the coasting trade: *Provided, however*, that nothing herein contained, shall be construed to extend to registered ships or vessels of the United States, having on board goods, wares, and merchandise of foreign growth or manufacture, brought into the United States in such ship or vessel from a foreign port, and on which the duties have not been paid or secured, according to law.

SEC. 21. *And be it further enacted*, That when any ship or vessel, licensed for carrying on the fishery, shall be intended to touch and trade at any foreign port or place it shall be the duty of the master, commander, or owner, to obtain permission for that purpose, from the collector of the district where such ship or vessel may be, previous to her departure, and the master or commander of every such ship or vessel, shall deliver like manifests, and make like entries, both of the ship or vessel, and of the goods, wares, or merchandise on board, within the same time, and under the same penalty, as by the laws of the United States, are provided for ships or vessels of the United States arriving from a foreign port. And if any ship or vessel, licensed for carrying on the fisheries, shall be found within three leagues of the coast, with goods, wares, or merchandise of foreign growth or manufacture, exceeding the value of five hundred dollars, without having such permission, as is herein directed, such ship or vessel, together with her goods, wares, or merchandise of foreign growth or manufacture imported therein, shall be subject to seizure and forfeiture.

SEC. 22. *And be it further enacted*, That the master or commander of every ship or vessel, employed in the transportation of goods from district to district, that shall put into a port, other than the one to which she was bound, shall, within twenty-four hours of his arrival, if there be an officer residing at such port, and she continue there so long, make report of his arrival, to such officer, with the name of the place he came from, and to which he is bound, with an account of his lading; and if the master of such ship or vessel shall neglect or refuse to do the same, he shall forfeit twenty dollars.

SEC. 23. *And be it further enacted*, That if the master or commander of any ship or vessel, employed in the transportation of goods, from district to district, having on board goods, wares, or merchandise, of foreign growth or manufacture, or distilled spirits, shall, on his arrival at the port to which he was destined, have lost or mislaid the certified manifest of the same, or the permit which was given therefor, by the collector or surveyor of the district from whence he sailed, the collector of the district where he shall so arrive, shall take bond for the payment of the duties on such goods, wares, and merchandise of foreign growth or manufacture, or distilled spirits, within six months, in the same manner, as though they were imported from a foreign country: *Provided however*, such bond shall be cancelled, if the said master shall deliver, or cause to be delivered to the collector taking such bond, and within the term therein limited for payment, a certificate from the collector or surveyor of the district from whence he sailed, that such goods were legally exported in such ship or vessel, from such district.

SEC. 24. *And be it further enacted*, That the master or commander of every foreign ship or vessel, bound from a district in the United States, to any other district within the same, shall, in all cases, previous to her departure, from such district, deliver to the collector of such district, duplicate manifests of the lading on board such ship or vessel, if there be any, or if there be none, he shall declare that such is the case, and to the truth of such manifests or declaration, he shall swear or affirm, and also obtain a permit, from the said collector, authorizing him to proceed to the place of his destination. And the master or commander of every such ship or vessel, on his arrival within any district, from any other district, shall, in all cases, within forty-eight hours after his arrival, and previous to the unlading any goods from on board such ship or vessel, deliver to the collector of the district where he may have arrived, a manifest of the goods laden on board such ship or vessel, if any there be, or if in ballast only, he shall so declare, and to the truth of which manifest or declaration, he shall swear or affirm; and also, that such manifest contains an account of all the goods, wares, and merchandise which were on board

such ship or vessel, at the time, or have been, since her departure from the place from whence she shall be reported last to have sailed; and he shall also deliver to such collector the permit which was given him from the collector of the district from whence he sailed. And if the master or commander of any such ship or vessel shall neglect or refuse complying with any of the requirements herein made, he shall forfeit one hundred dollars: *Provided always*, That nothing herein contained shall be construed as affecting the payment of tonnage, or any other requirements which such ships or vessels are now subject to by the present existing laws of the United States.

Sec. 25. *And be it further enacted*, That in every case, where the collector is, by this act, directed to grant any enrolment, license, certificate, permit, or other document, the naval officer residing at the port (if there be one) shall sign the same, and every surveyor who shall certify a manifest, or grant a permit, or who shall receive any certified manifest, or a permit as is provided for in this act, shall make monthly returns thereof, or sooner, if it can conveniently be made, to the collector of the district where such surveyor may reside.

Sec. 26. *And be it further enacted*, That before any ship or vessel, of the burden of five tons, and less than twenty tons, shall be licensed, the same admeasurement shall be made of such ship or vessel, and the same provisions observed relative thereto, as are to be observed in case of admeasuring ships or vessels to be registered or enrolled; but in all cases, where such ship or vessel, or any other licensed ship or vessel, shall have been once admeasured, it shall not be necessary to measure such ship or vessel anew, for the purpose of obtaining another enrolment or license, except such ship or vessel shall have undergone some alteration as to her burden, subsequent to the time of her former license.

Sec. 27. *And be it further enacted*, That it shall be lawful for any officer of the revenue, to go on board of any ship or vessel, whether she shall be within or without his district, and the same to inspect, search, and examine, and if it shall appear, that any breach of the laws of the United States has been committed, whereby such ship or vessel, or the goods, wares, and merchandise on board, or any part thereof, is, or are liable to forfeiture, to make seizure of the same.

Sec. 28. *And be it further enacted*, That in every case where a forfeiture of any ship or vessel, or of any goods, wares, or merchandise, shall accrue, it shall be the duty of the collector, or other proper officer, who shall give notice of the seizure of such ship or vessel, or of such goods, wares, or merchandise, to insert in the same advertisement, the name or names, and the place or places of residence, of the person or

persons, to whom any such ship or vessel, goods, wares, and merchandise belonged, or were consigned, at the time of such seizure, if the same shall be known to him.

SEC. 29. *And be it further enacted*, That every collector, who shall knowingly make any record of enrolment or license of any ship or vessel, and every other officer, or person, appointed by, or under them, who shall make any record, or grant any certificate, or other document whatever, contrary to the true intent and meaning of this act, or shall take any other, or greater fees, than are by this act allowed, or shall receive, for any service performed pursuant to this act, any reward or gratuity, and every surveyor, or other person appointed to measure ships or vessels, who shall wilfully deliver to any collector, or naval officer, a false description of any ship or vessel, to be enrolled or licensed, in pursuance of this act, shall, upon conviction of any such neglect or offence, forfeit to the United States five hundred dollars, and be rendered incapable of serving in any office of trust or profit, under the United States. And if any person, authorized and required by this act, in respect to his office, to perform any act or thing required by this act, shall wilfully neglect or refuse to do and perform the same, according to the true intent and meaning of this act, such person, on being duly convicted thereof, if not hereby subject to the penalty and disqualifications aforesaid, shall forfeit and pay the sum of five hundred dollars for the first offence, and a like sum for the second offence, and shall from thenceforward, be rendered incapable of holding any office of trust or profit under the United States.

SEC. 30. *And be it further enacted*, That if any person or persons shall swear, or affirm to any of the matters, herein required to be verified, knowing the same to be false, such person or persons shall suffer the like pains and penalties, as shall be incurred, by persons committing wilful and corrupt perjury. And if any person or persons shall forge, counterfeit, erase, alter, or falsify any enrolment, license, certificate, permit, or other document, mentioned or required in this act, to be granted by any officer of the revenue, such person or persons, so offending, shall forfeit five hundred dollars.

SEC. 31. *And be it further enacted*, That if any person or persons shall assault, resist, obstruct, or hinder any officer in the execution of this act, or of any other act or law of the United States, herein mentioned, or of any of the powers or authorities vested in him by this act, or any other act or law, as aforesaid, all and every person and persons so offending, shall, for every such offence, for which no other penalty is particularly provided, forfeit five hundred dollars.

SEC. 32. *And be it further enacted*, That if any licensed ship or vessel shall be transferred, in whole or in part, to any person, who is not, at the

time of such transfer, a citizen of, and resident within, the United States, or if any such ship or vessel shall be employed in any other trade than that for which she is licensed, or shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited.

SEC. 33. *Provided nevertheless, and be it further enacted*, That in all cases where the whole or any part of the lading, or cargo, on board any ship or vessel, shall belong *bonâ fide* to any person or persons other than the master, owner, or mariners of such ship or vessel, and upon which the duties shall have been previously paid or secured, according to law, shall be exempted from any forfeiture under this act, any thing therein contained to the contrary notwithstanding.

SEC. 34. *And be it further enacted*, That the fees and allowances for the several duties and services, to be performed, in virtue of this act, shall be as follow: that is to say:

For admeasuring every ship or vessel, in order to the enrolment, or licensing and recording the same, if of the burden of five tons, and less than twenty tons, fifty cents; if of twenty tons, and not exceeding seventy tons, seventy-five cents; if above seventy tons, and not exceeding one hundred tons, one hundred cents; if above one hundred tons, one hundred and fifty cents:

For every certificate of enrolment, fifty cents:

For every indorsement on a certificate of enrolment, twenty cents:

For every license, and granting the same, including the bond, if not exceeding twenty tons, twenty-five cents; if above twenty, and not more than one hundred tons, fifty cents; and if more than one hundred tons, one hundred cents:

For every indorsement on a license, twenty cents:

For certifying manifests, and granting a permit for a licensed vessel to proceed from district to district, twenty-five cents, if less than fifty tons, and if above fifty tons, fifty cents:

For receiving a certified manifest, and granting a permit, on the arrival of such vessel, twenty-five cents, if less than fifty tons, and if above fifty tons, fifty cents:

For certifying manifests, and granting a permit for a registered vessel to proceed from district to district, one hundred and fifty cents:

For receiving a certified manifest, and granting a permit, on the arrival of such registered vessel, one hundred and fifty cents:

For granting a permit for a vessel, not belonging to a citizen or citizens of the United States, to proceed from district to district, and receiving the manifest, two hundred cents:

For receiving a manifest, and granting a permit, to unload, for such last-

mentioned vessel, on her arrival in one district, from another district, two hundred cents:

For granting a permit for a vessel carrying on the fishery, to trade at a foreign port, twenty-five cents, and for the report and entry of any foreign goods imported in such vessel, twenty-five cents.

And where a surveyor shall certify a manifest, or grant a permit, or receive a certified manifest and grant a permit, the fees arising therefrom, shall be received by him solely for his use. And all other fees arising, by virtue of this act, shall be received, and accounted for, by the collector, or, at his option, by the naval officer, where there is one, and where there is a collector, naval officer, and surveyor, shall be equally divided, monthly, between the said officers; and where there is no naval officer, two thirds to the collector, and the other third to the surveyor; and where there is only a collector, he shall receive the whole amount thereof; and where there is more than one surveyor in any district, each of them shall receive his proportionable part of such fees, as shall arise in the port, for which he is appointed: *Provided always*, That in all cases, where the tonnage of any ship or vessel shall be ascertained, by any person appointed for that purpose, such person shall be paid a reasonable compensation therefor, out of the fees aforesaid, before any distribution thereof, as aforesaid; and every collector and naval officer, and every surveyor, who shall reside at a port where there is no collector, shall cause to be affixed, and constantly kept, in some conspicuous place of his office, a fair table of the rates of fees, demandable by this act.

Sec. 35. *And be it further enacted*, That all penalties and forfeitures, which shall be incurred by virtue and force of this act, shall and may be sued for, prosecuted and recovered, in like manner, as penalties and forfeitures, incurred by virtue of the act, intituled "An act to regulate the collection of the duties imposed by law on goods, wares, and merchandise imported into the United States, and on the tonnage of ships or vessels," may be sued for, prosecuted and recovered, and shall be appropriated in like manner: *Provided always*, That if any officer, entitled to a part or share of any such penalty or forfeiture, shall be necessary as a witness on the trial for such penalty or forfeiture, such officer may be a witness upon the said trial; but in such case, he shall not receive, or be entitled to any part or share of the said penalty or forfeiture, and the part or share to which he would otherwise have been entitled, shall accrue to the United States.

Sec. 36. *And be it further enacted*, That this act shall commence, and take effect, from and after the last day of May next, and thenceforth, the act, intituled "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and also, the act, intituled "An

act to explain and amend an act, intituled An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," shall be repealed, and cease to operate, except as to the validity of the registers, records, enrolments, and licenses, with the certificates and documents, which shall have been done or granted, in pursuance of those acts, prior to the first day of June next, which shall continue to be of the like force and effect, as if the said acts were not repealed; and except also, as to the prosecution, recovery, and distribution of, and for fines, penalties, and forfeitures, which may have been incurred prior to the first day of June next, for which purpose likewise, the said acts shall continue in force.

SEC. 37. *And be it further enacted*, That nothing in this act, shall be construed to extend to any boat or lighter, not being masted, or if masted, and not decked, employed in the harbor of any town or city.

ACT OF 1796, CHAPTER XXXVI. (1 U. S. Stats. at Large, 477).

An Act for the Relief and Protection of American Seamen.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States, by and with the advice and consent of the Senate, be, and hereby is authorized to appoint two or more agents; the one of whom shall reside in the kingdom of Great Britain, and the others at such foreign ports, as the President of the United States shall direct. That the duty of the said agents shall be, under the direction of the President of the United States, to inquire into the situation of such American citizens or others, sailing, conformably to the law of nations, under the protection of the American flag, as have been, or may hereafter be impressed or detained by any foreign power, to endeavor, by all legal means, to obtain the release of such American citizens or others, as aforesaid; and to render an account of all impressments and detentions whatever, from American vessels, to the executive of the United States.

SEC. 2. *And be it further enacted*, That if it should be expedient to employ an additional agent or agents, for the purposes authorized by this law, during the recess of the senate, the president alone be, and hereby is, authorized to appoint such agent or agents.

SEC. 3. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to draw, annually, out of the treasury of the United States, a sum not exceeding fifteen thousand dollars, not otherwise appropriated, to be applied by him in such proportions

as he shall direct, to the payment of the compensation of the said agents, for their services, and the incidental expenses attending the performance of the duties imposed on them by this act.

SEC. 4. *And be it further enacted*, That the collector of every district shall keep a book or books, in which, at the request of any seaman, being a citizen of the United States of America, and producing proof of his citizenship, authenticated in the manner hereinafter directed, he shall enter the name of such seaman, and shall deliver to him a certificate, in the following form, that is to say: "I, A. B., collector of the district of D., do hereby certify, That E. F., an American seaman, aged years, or thereabouts, of the height of feet inches [describing the said seaman as particularly as may be], has, this day, produced to me proof in the manner directed in the act, intituled 'An act for the relief and protection of American seamen;' and, pursuant to the said act, I do hereby certify, that the said E. F. is a citizen of the United States of America In witness whereof, I have hereunto set my hand and seal of office, this day of ." And it shall be the duty of the collectors aforesaid, to file and preserve the proofs of citizenship produced, as aforesaid: And for each certificate delivered, as aforesaid, the said collectors shall be entitled to receive from the seamen applying for the same, the sum of twenty-five cents.

SEC. 5. And, in order that full and speedy information may be obtained of the seizure or detention, by any foreign power, of any seamen employed on board any ship or vessel of the United States, *Be it further enacted*, That it shall, and hereby is declared to be the duty of the master of every ship or vessel of the United States, any of the crew whereof shall have been impressed or detained by any foreign power, at the first port at which such ship or vessel shall arrive, if such impressment or detention happened on the high seas, or if the same happened within any foreign port, then in the port in which the same happened, immediately to make a protest, stating the manner of such impressment or detention, by whom made, together with the name and place of residence of the person impressed or detained; distinguishing also, whether he was an American citizen; and if not, to what nation he belonged. And it shall be the duty of such master, to transmit by post, or otherwise, every such protest made in a foreign country, to the nearest consul or agent, or to the minister of the United States resident in such country, if any such there be; preserving a duplicate of such protest, to be by him sent immediately after his arrival within the United States, to the secretary of state, together with information to whom the original protest was transmitted: And in case such protest shall be made within the United States, or in any foreign country, in which no consul, agent, or minister of the United States resides, the same

shall, as soon thereafter as practicable, be transmitted by such master, by post or otherwise, to the secretary of state.

SEC. 6. *And be it further enacted*, That a copy of this law be transmitted by the secretary of state, to each of the ministers and consuls of the United States, resident in foreign countries, and by the secretary of the treasury, to the several collectors of the districts of the United States, whose duty it is hereby declared to be, from time to time, to make known the provisions of this law, to all masters of ships and vessels of the United States entering, or clearing at their several offices. And the master of every such ship or vessel shall, before he is admitted to an entry, by any such collector, be required to declare on oath, whether any of the crew of the ship or vessel under his command have been impressed or detained, in the course of his voyage, and how far he has complied with the directions of this act: and every such master as shall wilfully neglect or refuse to make the declarations herein required, or to perform the duties enjoined by this act, shall forfeit and pay the sum of one hundred dollars. And it is hereby declared to be the duty of every such collector to prosecute for any forfeiture that may be incurred under this act.

SEC. 7. *And be it further enacted*, That the collector of every port of entry in the United States shall send a list of the seamen registered under this act, once every three months, to the secretary of state, together with an account of such impressments or detentions, as shall appear, by the protests of the masters, to have taken place.

SEC. 8. *And be it further enacted*, That the first, second, and third sections of this act shall be in force for one year, and from thence to the end of the next session of Congress thereafter, and no longer.

ACT OF 1796, CHAPTER XLV. (1 U. S. Stats. at Large, 489).

An Act providing Passports for the Ships and Vessels of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be the duty of the secretary of state, to prepare a form, which, when approved by the president, shall be deemed the form of a passport for ships and vessels of the United States.

SEC. 2. *And be it further enacted*, That every ship and vessel of the United States, going to any foreign country, shall, before she departs from the United States, at the request of the master, be furnished by the collector for the district, where such ship or vessel may be, with a passport of the form prescribed and established, pursuant to the foregoing section;

for which passport, the master of such ship or vessel, shall pay to the said collector, ten dollars, to be accounted for by him; and in order to be entitled to such passport, the master of every such ship or vessel shall be bound with sufficient sureties, to the treasurer of the United States, in the penalty of two thousand dollars, conditioned, that the said passport shall not be applied to the use or protection of any other ship or vessel, than the one described in the same; and that, in case of the loss or sale of any ship or vessel having such passport, the same shall, within three months, be delivered up to the collector from whom it was received, if the loss or sale take place within the United States; or within six months, if the same shall happen at any place nearer than the Cape of Good Hope; and within eighteen months, if at a more distant place.

Sec. 3. *And be it further enacted*, That there shall be paid on every ship and vessel of the United States sailing or trading to any foreign country, other than some port or place in America, for each and every voyage, the sum of four dollars, to be received and accounted for, by the collector, at the time of clearing outward, if such vessel be bound direct to such foreign country, from any port of the United States, or at the time of entry in the United States, if such ship or vessel shall have sailed to such foreign country, from any port or place in America, other than of the United States.

Sec. 4. *And be it further enacted*, That if any ship or vessel of the United States, shall depart therefrom, after the first day of September next, and shall be bound to any foreign country, other than to some port or place in America, without such passport, the master of such ship or vessel shall forfeit and pay the sum of two hundred dollars for every such offence.

ACT OF 1797, CHAPTER VII. (1 U. S. Stats. at Large, 498).

An Act, in addition to an Act, intituled "An Act concerning the registering and recording of Ships or Vessels," and to an Act, intituled "An Act for enrolling and licensing Ships and Vessels employed in the Coasting Trade and Fisheries, and for regulating the same."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever it shall appear, by satisfactory proof, to the secretary of the treasury, that any ship or vessel hath been sold and transferred by process of law; and that the register, certificate of enrolment, or license, as the case may be, of such ship or vessel, is retained by the former owners, it shall be lawful for the said secretary, to order and direct the collector of the district to which such ship or vessel may belong, to grant a new register, certificate of en-

rolment, or license, as the case may be, on the owners, under such sale, complying with such terms and conditions, as are, by law, required for granting of such papers; excepting only the delivering up of the former certificate of registry, enrolment, or license, as the case may be: *Provided nevertheless*, that nothing in this act contained, shall be construed to remove the liability of any person or persons to any penalty for not surrendering up the papers, belonging to any ship or vessel, on a transfer or sale of the same.

ACT OF 1797, CHAPTER V. (1 U. S. Stats. at Large, 523).

An Act in addition to an Act, intituled "An Act concerning the registering and recording of Ships and Vessels."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no ship or vessel which has been, or shall be registered, pursuant to any law of the United States, and which hereafter shall be seized, or captured and condemned, under the authority of any foreign power, or that shall by sale become the property of a foreigner or foreigners, shall, after the passing of this act, be entitled to, or capable of receiving, a new register, notwithstanding such ship or vessel should afterwards become American property; but that all such ships and vessels shall be taken and considered, to all intents and purposes, as foreign vessels: *Provided*, That nothing in this act contained, shall extend to, or be construed to affect the person or persons owning any ship or vessel, at the time of the seizure, or capture of the same, or shall prevent such owner, in case he regain a property in such ship or vessel, so condemned, by purchase or otherwise, from claiming and receiving a new register for the same, as he might or could have done, if this act had not been passed.

ACT OF 1798, CHAPTER LXXVII. (1 U. S. Stats. at Large, 605).

An Act for the relief of sick and disabled Seamen.

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of September next, the master or owner of every ship or vessel of the United States, arriving from a foreign port into any port of the United States, shall, before such ship or vessel shall be admitted to an entry, render to the collector a true account of the number of seamen,

that shall have been employed on board such vessel since she was last entered at any port in the United States, — and shall pay to the said collector, at the rate of twenty cents per month for every seaman so employed; which sum he is hereby authorized to retain out of the wages of such seamen.

Sec. 2. *And be it further enacted*, That from and after the first day of September next, no collector shall grant to any ship or vessel whose enrolment or license for carrying on the coasting trade has expired, a new enrolment or license before the master of such ship or vessel shall first render a true account to the collector, of the number of seamen, and the time they have severally been employed on board such ship or vessel, during the continuance of the license which has so expired, and pay to such collector twenty cents per month for every month such seamen have been severally employed, as aforesaid; which sum the said master is hereby authorized to retain out of the wages of such seamen. And if any such master shall render a false account of the number of men, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay one hundred dollars.

Sec. 3. *And be it further enacted*, That it shall be the duty of the several collectors to make a quarterly return of the sums collected by them, respectively, by virtue of this act, to the secretary of the treasury; and the President of the United States is hereby authorized, out of the same, to provide for the temporary relief and maintenance of sick or disabled seamen, in the hospitals or other proper institutions now established in the several ports of the United States, or, in ports where no such institutions exist, then in such other manner as he shall direct: *Provided*, that the moneys collected in any one district, shall be expended within the same.

Sec. 4. *And be it further enacted*, That if any surplus shall remain of the moneys to be collected by virtue of this act, after defraying the expense of such temporary relief and support, that the same, together with such private donations as may be made for that purpose (which the president is hereby authorized to receive) shall be invested in the stock of the United States, under the direction of the president; and when, in his opinion, a sufficient fund shall be accumulated, he is hereby authorized to purchase or receive cessions or donations of ground or buildings, in the name of the United States, and to cause buildings, when necessary, to be erected as hospitals for the accommodation of sick and disabled seamen.

Sec. 5. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to nominate and appoint, in such ports of the United States, as he may think proper, one or more persons,

to be called directors of the marine hospital of the United States, whose duty it shall be to direct the expenditure of the fund assigned for their respective ports, according to the third section of this act; to provide for the accommodation of sick and disabled seamen, under such general instructions as shall be given by the President of the United States, for that purpose, and also subject to the like general instructions, to direct and govern such hospitals as the president may direct to be built in the respective ports: and that the said directors shall hold their offices during the pleasure of the president, who is authorized to fill up all vacancies that may be occasioned by the death or removal of any of the persons so to be appointed. And the said directors shall render an account of the moneys received and expended by them, once in every quarter of a year, to the secretary of the treasury, or such other person as the president shall direct; but no other allowance or compensation shall be made to the said directors, except the payment of such expenses as they may incur in the actual discharge of the duties required by this act.

ACT OF 1799, CHAPTER XXXVI. (1 U. S. Stats. at Large, 729).

An Act in addition to "An Act for the relief of sick and disabled Seamen."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States shall be, and he hereby is authorized to direct the expenditure of any moneys which have been or shall be collected by virtue of an act, intituled "An act for the relief of sick and disabled seamen," to be made within the State wherein the same shall have been collected, or within the State next adjoining thereto, excepting what may be collected in the States of New Hampshire, Massachusetts, Rhode Island, and Connecticut; any thing in the said act contained to the contrary thereof, notwithstanding.

SEC. 2. *And be it further enacted*, That the secretary of the navy shall be, and he hereby is authorized and directed to deduct, after the first day of September next, from the pay thereafter to become due, of the officers, seamen, and marines of the navy of the United States, at the rate of twenty cents per month, for every such officer, seaman, and marine, and to pay the same quarter annually to the secretary of the treasury, to be applied to the same purposes, as the money collected by virtue of the above-mentioned act is appropriated.

SEC. 3. *And be it further enacted*, That the officers, seamen, and marines of the navy of the United States, shall be entitled to receive the

same benefits and advantages, as by the act above mentioned are provided for the relief of the sick and disabled seamen of the merchant vessels of the United States.

ACT OF 1802, CHAPTER LI. (2 U. S. Stats. at Large, 192).

An Act to amend an Act intituled "An Act for the relief of sick and disabled Seamen," and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the moneys heretofore collected in pursuance of the several acts "for the relief of sick and disabled seamen," and at present unexpended, together with the moneys hereafter to be collected by authority of the before-mentioned acts, shall constitute a general fund, which the President of the United States shall use and employ as circumstances shall require, for the benefit and convenience of sick and disabled American seamen: *Provided,* that the sum of fifteen thousand dollars be, and the same is hereby appropriated for the erection of an hospital in the district of Massachusetts.

SEC. 2. *And be it further enacted,* That it shall be lawful for the President of the United States to cause such measures to be taken as, in his opinion, may be expedient for providing convenient accommodations, medical assistance, necessary attendance, and supplies for the relief of sick or disabled seamen of the United States, who may be at or near the port of New Orleans, in case the same can be done with the assent of the government having jurisdiction over the port; and for this purpose, to establish such regulations, and to authorize the employment of such persons as he may judge proper; and that for defraying the expense thereof, a sum not exceeding three thousand dollars be paid out of any moneys arising from the said fund not otherwise appropriated.

SEC. 3. *And be it further enacted,* That from and after the thirtieth day of June next, the master of every boat, raft, or flat, belonging to any citizen of the United States, which shall go down the Mississippi with intention to proceed to New Orleans, shall, on his arrival at Fort Adams, render to the collector or naval officer thereof, a true account of the number of persons employed on board such boat, raft, or flat, and the time that each person has been so employed, and shall pay to the said collector or naval officer at the rate of twenty cents per month, for every person so employed, which sum, he is hereby authorized to retain out of the wages of such person: and the said collector or naval officer shall not give a clearance for such boat, raft, or flat, to proceed on her voyage to New Orleans, until an account be rendered to him of the number of

persons employed on board such boat, raft, or flat, and the money paid to him by the master or owner thereof: and if any such master shall render a false account of the number of persons, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay fifty dollars, which shall be applied to, and shall make a part of, the said general fund for the purposes of this act: *Provided*, that all persons employed in navigating any such boat, raft, or flat, shall be considered as seamen of the United States, and entitled to the relief extended by law to sick and disabled seamen.

SEC. 4. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to nominate and appoint for the port of New Orleans, a fit person to be director of the marine hospital of the United States, whose duties shall be in all instances the same as the directors of the marine hospitals of the United States, as directed and required by the act, intituled "An act for the relief of sick and disabled seamen." [Act of July 16, 1798, chap. 76.]

SEC. 5. *And be it further enacted*, That each and every director of the marine hospitals within the United States, shall, if it can with convenience be done, admit into the hospital of which he is director, sick foreign seamen, on the application of the master or commander of any foreign vessel to which such sick seamen may belong; and each seaman so admitted shall be subject to a charge of seventy-five cents per day for each day he may remain in the hospital, the payment of which the master or commander of such foreign vessel shall make to the collector of the district in which such hospital is situated: and the collector shall not grant a clearance to any foreign vessel, until the money due from such master or commander, in manner and form aforesaid, shall be paid; and the director of each hospital is hereby directed, under the penalty of fifty dollars, to make out the accounts against each foreign seaman that may be placed in the hospital, under his direction, and render the same to the collector.

SEC. 6. *And be it further enacted*, That the collectors shall pay the money collected, by virtue of this and the act to which this is an amendment, into the treasury of the United States, and be accountable therefor, and receive the same commission thereon, as for other money by them collected.

SEC. 7. *And be it further enacted*, That each and every director of the marine hospitals shall be accountable at the treasury of the United States for the money by them received in the same manner as other receivers of public money, and for the sums by them expended shall be allowed a commission at the rate of one per cent.

ACT OF 1800, CHAPTER XIV. (2 U. S. Stats. at Large, 16).

An Act providing for Salvage in cases of Recapture.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That when any vessel other than a vessel of war or privateer, or when any goods which shall hereafter be taken as prize by any vessel, acting under authority from the government of the United States, shall appear to have before belonged to any person or persons, resident within or under the protection of the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government, or State, against which the United States have authorized, or shall authorize, defence or reprisals, such vessel or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, if retaken by a public vessel of the United States, one eighth part, and if retaken by a private vessel of the United States, one sixth part, of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war, before such capture or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay for and in lieu of salvage, one moiety of the true value of such vessel of war, or privateer.

SEC. 2. *And be it further enacted*, That when any vessel or goods, which shall hereafter be taken as prize, by any vessel acting under authority from the government of the United States, shall appear to have before belonged to the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority from any prince, government, or State, against which the United States have authorized, or shall authorize, defence or reprisals, such public vessel not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the United States. And for and in lieu of salvage, there shall be paid from the treasury of the United States, pursuant to the final decree which shall be made in such case by any court of the United States, having competent jurisdiction thereof, to the parties who shall be thereby entitled to receive the same, for the recapture as aforesaid, of an unarmed vessel, or any goods therein, one sixth part of the true value thereof, when made by a private vessel of the United States, and one twelfth part of such value when the

recapture shall be made by a public armed vessel of the United States; and for the recapture as aforesaid of a public armed vessel, or any goods therein, one moiety of the true value thereof, when made by a private vessel of the United States, and one fourth part of such value, when such recapture shall be made by a public armed vessel of the United States.

SEC. 3. *And be it further enacted*, That when any vessel or goods which shall be taken as prize, as aforesaid, shall appear to have before belonged to any person or persons permanently resident within the territory, and under the protection of any foreign prince, government, or State, in amity with the United States, and to have been taken by an enemy of the United States, or by authority or pretence of authority from any prince, government, or State, against which the United States have authorized, or shall authorize, defence or reprisals, then such vessel or goods shall be adjudged to be restored to the former owner or owners thereof, he or they paying for and in lieu of salvage, such proportion of the true value of the vessel or goods so to be restored, as by the law or usage of such prince, government, or State, within whose territory such former owner or owners shall be so resident, shall be required on the restoration of any vessel or goods of a citizen of the United States, under like circumstances of recapture, made by the authority of such foreign prince, government, or State; and where no such law or usage shall be known, the same salvage shall be allowed as is provided by the first section of this act: *Provided*, that no such vessel or goods shall be adjudged to be restored to such former owner or owners, in any case where the same shall have been, before the recapture thereof, condemned as prize by competent authority, nor in any case where by the law or usage of the prince, government, or State, within whose territory such former owner or owners shall be resident as aforesaid, the vessel or goods of a citizen of the United States, under like circumstances of recapture, would not be restored to such citizen of the United States: *Provided also*, that nothing herein shall be construed to contravene or alter the terms of restoration in cases of recapture, which are or shall be agreed on in any treaty between the United States, and any foreign prince, government, or State.

SEC. 4. *And be it further enacted*, That all sums of money which may be paid for salvage, as aforesaid, when accruing to any public armed vessel, shall be divided to and among the commanders, officers, and crew thereof, in such proportions as are or may be provided by law, respecting the distribution of prize money: and when accruing to any private armed vessel, shall be distributed to and among the owners and company concerned in such recapture, according to their agreements, if any such

there be; and in case there be no such agreement, then to and among such persons, and in such proportions, as the court having jurisdiction thereof shall appoint.

SEC. 5. *And be it further enacted*, That such parts of any acts of Congress of the United States, as respect the salvage to be allowed in cases of recapture, shall be, and are hereby repealed, except as to cases of recapture made before the passing of this act.

ACT OF 1803, CHAPTER IX. (2 U. S. Stats. at Large, 203).

An Act supplementary to the "Act concerning Consuls and Vice-Consuls, and for the further protection of American Seamen."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs, a list, containing the names, places of birth and residence, and a description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them, and the said collector shall deliver him a certified copy thereof, for which the collector shall be entitled to receive the sum of twenty-five cents; and the said master shall moreover enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibit the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States, at which he shall arrive on his return thereto, and then and there also produce the persons named therein, to the said boarding officer, whose duty it shall be to examine the men with such list, and to report the same to the collector, and it shall be the duty of the collector at the said port of arrival (where the same is different from the port from which the vessel originally sailed), to transmit a copy of the list so reported to him, to the collector of the port from which said vessel originally sailed: *Provided*, that the said bond shall not be forfeited on account of the said master not producing to the first boarding officer, as aforesaid, any of the persons contained in the said list, who may be discharged in a foreign country with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, signified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew as aforesaid; nor on account of any such person dying or absconding, or being forcibly impressed into

other service, of which satisfactory proof shall be then also exhibited to the collector.

Sec. 2. *And be it further enacted*, That it shall be the duty of every master or commander of a ship or vessel, belonging to citizens of the United States, who shall sail from any port of the United States, after the first day of May next, on his arrival at a foreign port, to deposit his register, sea letter, and Mediterranean passport with the consul, vice-consul, commercial agent, or vice-commercial agent (if any there be at such port); that in case of refusal or neglect of the said master or commander, to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice-commercial agent, in his own name, for the benefit of the United States, in any court of competent jurisdiction; and it shall be the duty of such consul, vice-consul, commercial agent, or vice-commercial agent, on such master or commander producing to him a clearance from the proper officer of the port, where his ship or vessel may be, to deliver to the said master or commander all of his said papers: *Provided*, such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement.

Sec. 3. *And be it further enacted*, That whenever a ship or vessel belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid; and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul, or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in such foreign port, and the several sums retained for such fund shall be accounted for with the treasury every six months by the persons receiving the same.

Sec. 4. *And be it further enacted*, That it shall be the duty of the consuls, vice-consuls, commercial agents, vice-commercial agents of the United States, from time to time, to provide for the mariners and seamen of the

United States, who may be found destitute within their districts respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the secretary of state shall give; and that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls, vice-consuls, commercial agents, or vice-commercial agents respectively, and to transport them to the port in the United States to which such ships or vessels may be bound, on such terms, not exceeding ten dollars for each person, as may be agreed between the said master and consul, or commercial agent. And the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels according to their several abilities: *Provided*, that no master or captain of any ship or vessel shall be obliged to take a greater number than two men to every one hundred tons burden of the said ship or vessel, on any one voyage; and if any such captain or master shall refuse the same on the request or order of the consul, vice-consul, commercial agent, or vice-commercial agent, such captain or master shall forfeit and pay the sum of one hundred dollars for each mariner or seaman so refused, to be recovered for the benefit of the United States in any court of competent jurisdiction. And the certificate of any such consul or commercial agent, given under his hand and official seal, shall be *primâ facie* evidence of such refusal in any court of law having jurisdiction for the recovery of the penalty aforesaid.

Sec. 5. *And be it further enacted*, That the seventh and eighth sections of the act, intituled "An act concerning consuls and vice-consuls," (1792, c. 24,) be and the same are hereby repealed; and that the secretary of state be authorized to reimburse the consuls, vice-consuls, commercial agents, or vice-commercial agents, such reasonable sums as they may heretofore have advanced for the relief of seamen, though the same should exceed the rate of twelve cents a man per diem.

Sec. 6. *And be it further enacted*, That it shall and may be lawful for every consul, vice-consul, commercial agent, and vice-commercial agent of the United States, to take and receive for every certificate of discharge of any seaman or mariner in a foreign port fifty cents; and for commission on paying and receiving the amount of wages payable on the discharge of seamen in foreign ports, two and a half per centum.

Sec. 7. *And be it further enacted*, That if any consul, vice-consul, commercial agent, or vice-commercial agent, shall falsely and knowingly certify, that property belonging to foreigners is property belonging to citizens of the United States, he shall, on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding ten thousand dol-

lars, at the discretion of the court, and be imprisoned for any term not exceeding three years.

SEC. 8. *And be it further enacted*, That if any consul, vice-consul, commercial agent, or vice-commercial agent, shall grant a passport or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States, he shall, on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding one thousand dollars.

ACT OF 1803, CHAPTER XVI. (2 U. S. Stats. at Large, 208).

An Act supplementary to the Act, intituled "An Act providing passports for the Ships and Vessels of the United States."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every unregistered ship or vessel owned by a citizen or citizens of the United States, and sailing with a sea-letter, going to any foreign country, shall, before she departs from the United States, at the request of the master, be furnished by the collector of the district where such vessel may be, with a passport of the form prescribed and established by the act to which this is a supplement, for which the master shall pay to the collector ten dollars, and be subject to the rules and conditions prescribed in the said act, for ships and vessels of the United States.

SEC. 2. *And be it further enacted*, That there shall be paid on every such unregistered ship or vessel, sailing or trading to any foreign country, other than some port or place in America, for each and every voyage, the same sum at the time of clearing outwards, to be received and accounted for in the same manner as is by said act required in cases of ships and vessels of the United States.

ACT OF 1803, CHAPTER XVIII. (2 U. S. Stats. at Large, 209).

An Act in addition to the Act, intituled "An Act concerning the registering and recording of Ships and Vessels of the United States," and to the Act, intituled "An Act to regulate the collection of duties on Imports and Tonnage."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That if any person shall knowingly make, utter, or publish any false sea-letter, Mediterranean passport, or certificate of registry, or shall knowingly avail himself of any such Mediterranean passport, sea-letter, or certificate of regis-

try, he shall forfeit and pay a sum not exceeding five thousand dollars, to be recovered by action of debt, in the name of the United States, in any court of competent jurisdiction; and if an officer of the United States, he shall for ever thereafter be rendered incapable of holding any office of trust or profit, under the authority of the United States.

SEC. 2. *And be it further enacted*, That it shall be the duty of the comptroller of the treasury, to cause to be provided, blank certificates of registry, with such water and other secret marks as he may direct, which marks shall be made known only to the collectors and their deputies, and to the consuls or commercial agents of the United States; and from and after the thirty-first day of December next, no certificate of registry shall be issued, except such as shall have been provided and marked as aforesaid; and the ships or vessels of the United States, which shall have been duly registered as such, shall be entitled to new certificates of registry (gratis) in exchange for their old certificates of registry: and it shall be the duty of the respective collectors, on the departure of any such ship or vessel, after the said thirty-first day of December, from the district to which such ship or vessel shall belong, to issue a new certificate accordingly, and to retain and deface the former certificate.

SEC. 3. *And be it further enacted*, That when any ship or vessel, which has been, or which shall be registered pursuant to any law of the United States, shall, whilst such ship or vessel is without the limits of the United States, be sold or transferred in whole or in part to a citizen or citizens of the said States, such ship or vessel, on her first arrival in the United States thereafter, shall be entitled to all the privileges and benefits of a ship or vessel of the United States: *Provided*, that all the requisites of law, in order to the registry of ships or vessels, shall be complied with, and a new certificate of registry obtained for such ship or vessel, within three days from the time at which the master or other person having the charge or command of such ship or vessel, is required to make his final report upon her first arrival afterwards as aforesaid, agreeably to the thirtieth section of the act, passed on the second day of March, one thousand seven hundred and ninety-nine, intituled "An act to regulate the collection of duties on imports and tonnage." And it shall be lawful to pay to the collector of the district within which such ship or vessel may arrive as aforesaid, the duties imposed by law on the tonnage of such ship or vessel, at any time within three days from the time at which the master or other person having the charge or command of such ship or vessel, is required to make his final report as aforesaid, any thing to the contrary in any former law notwithstanding: *Provided always*, that nothing herein contained shall be construed to repeal, or in anywise change the provisions, restrictions, or limitations of any former act or acts, excepting so far as the same shall be repugnant to the provisions of this act.

SEC. 4. *And be it further enacted*, That the power vested in the secretary of the treasury, to remove disabilities incurred under the act to which this is a supplement, and under the act, intituled "An act for enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same," shall extend to the remission of any foreign duties, which shall have been or shall be incurred by reason of such disabilities.

ACT OF 1804, CHAPTER LI. (2 U. S. Stats. at Large, 296).

An Act to repeal a part of the Act intituled "An Act supplementary to the Act concerning Consuls and Vice-Consuls, and for the further protection of American Seamen."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the ninth section of the act, intituled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," passed the twenty-eighth of February, one thousand eight hundred and three, be, and the same is hereby repealed.

SEC. 2. *And be it further enacted*, That all powers of attorney for the transfer of any stock of the United States, or for the receipt of interest thereon, executed in a foreign country, since the thirtieth day of June one thousand eight hundred and three, according to the forms in use at the treasury of the United States prior to the said thirtieth day of June, one thousand eight hundred and three, shall be valid to all intents and purposes: any provision in the aforesaid section hereby repealed to the contrary notwithstanding.

ACT OF 1804, CHAPTER LII. (2 U. S. Stats. at Large, 296).

An Act to amend the Act intituled "An Act concerning the registering and recording of Ships and Vessels."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no ship or vessel shall be entitled to be registered as a ship or vessel of the United States, or if registered, to the benefits thereof, if owned in whole or in part by any person naturalized in the United States, and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless such person be in the capacity of a consul or other public agent of the United States: *Provided*, that nothing herein contained shall be construed to prevent the registering anew

of any ship or vessel before registered, in case of a *bonâ fide* sale thereof to any citizen or citizens resident in the United States: *And provided also*, that satisfactory proof of the citizenship of the person on whose account a vessel may be purchased, shall be first exhibited to the collector, before a new register shall be granted for such vessel.

SEC. 2. *And be it further enacted*, That the proviso in the act, intituled "An act in addition to an act, intituled An act concerning the registering and recording of ships and vessels," passed the twenty-seventh of June, one thousand seven hundred and ninety-seven, shall be taken and deemed to extend to the executors or administrators of the owner or owners of vessels, in the said proviso described.

ACT OF 1805, CHAPTER XXVIII. (2 U. S. Stats. at Large, 330).

An Act to amend the Act, intituled "An Act for the government and regulation of Seamen in the Merchants' Service."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions, regulations, and penalties which are contained in the eighth section of the act, intituled "An act for the government and regulation of seamen in the merchants' service," so far as relates to a chest of medicines to be provided for vessels of one hundred and fifty tons burden and upwards, shall be extended to all merchant vessels of the burden of seventy-five tons, or upwards, navigated with six persons or more, in the whole, and bound from the United States to any port or ports in the West Indies.

ACT OF 1810, CHAPTER XIX. (2 U. S. Stats. at Large, 568).

An Act to prevent the issuing of Sea Letters except to certain Vessels.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the thirtieth of June next, no sea letter or other document certifying or proving any ship or vessel to be the property of a citizen or citizens of the United States, shall be issued except to ships or vessels duly registered, or enrolled and licensed as ships or vessels of the United States, or to vessels which at that time shall be wholly owned by citizens of the United States, and furnished with or entitled to sea letters or other custom-house documents, any law or laws heretofore passed to the contrary notwith-

standing: *Provided nevertheless*, that no sea letter shall be issued to any vessel which shall not at this time be furnished or entitled to a sea letter, unless such vessel shall return to some port or place in the United States or territories thereof on or before the said thirtieth day of June next: *Provided nevertheless*, that no sea letter or other document, certifying or proving any ship or vessel to be the property of a citizen or citizens of the United States, shall be issued to any vessel now abroad, which shall not at this time be furnished or entitled to a sea letter, unless such vessel shall arrive at some port or place in the United States or territories thereof, on or before the said thirtieth day of June next; and provided that nothing herein contained shall be construed to operate against any such vessel or vessels that now are, or may be, prior to the said thirtieth of June, detained abroad by the authority of any foreign power.

ACT OF 1811, CHAPTER XXVI. (2 U. S. Stats. at Large, 650).

An Act establishing Navy Hospitals.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the money hereafter collected by virtue of the act, intituled "An act in addition to an act for the relief of sick and disabled seamen," shall be paid to the secretary of the navy, the secretary of the treasury, and the secretary of war, for the time being, who are hereby appointed a board of commissioners, by the name and style of commissioners of navy hospitals, which, together with the sum of fifty thousand dollars hereby appropriated out of the unexpended balance of the marine hospital fund, to be paid to the commissioners aforesaid, shall constitute a fund for navy hospitals.

SEC. 2. *And be it further enacted*, That all fines imposed on navy officers, seamen, and marines, shall be paid to the commissioners of navy hospitals.

SEC. 3. *And be it further enacted*, That the commissioners of navy hospitals be and they are hereby authorized and required to procure at a suitable place or places proper sites for navy hospitals, and if the necessary buildings are not procured with the site, to cause such to be erected, having due regard to economy, and giving preference to such plans as with most convenience and least cost will admit of subsequent additions, as the funds will permit and circumstances require; and the commissioners are required at one of the establishments, to provide a permanent asylum for disabled and decrepid navy officers, seamen, and marines.

SEC. 4. *And be it further enacted*, That the secretary of the navy be authorized and required to prepare the necessary rules and regulations for the government of the institution, and report the same to the next session of congress.

SEC. 5. *And be it further enacted*, That when any navy officer, seaman, or marine, shall be admitted into a navy hospital, that the institution shall be allowed one ration per day during his continuance therein, to be deducted from the account of the United States with such officer, seaman, or marine; and in like manner, when any officer, seaman, or marine, entitled to a pension, shall be admitted into a navy hospital, such pension during his continuance therein shall be paid to the commissioners of the navy hospitals, and deducted from the account of such pensioner.

ACT OF 1811, CHAPTER XXVIII. (2 U. S. Stats. at Large, 651).

An Act in addition to the Act, intituled "An Act supplementary to the Act concerning Consuls and Vice-Consuls," and for the further protection of American Seamen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where distressed mariners and seamen of the United States have been transported from foreign ports where there was no consul, vice-consul, commercial agent, or vice-commercial agent of the United States, to ports of the United States; and in all cases where they shall hereafter be so transported, there shall be allowed to the master or owner of each vessel, in which they shall or may have been transported, such reasonable compensation, in addition to the allowance now fixed by law, as shall be deemed equitable by the comptroller of the treasury.

ACT OF 1812, CHAPTER XL. (2 U. S. Stats. at Large, 694).

An Act respecting the Enrolling and Licensing of Steamboats.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passing of this act, a steamboat employed, or intended to be employed only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, may, and shall be enrolled and licensed, as if the same belonged to a citizen of the United States, according to, and subject to all the conditions, limitations, and

provisions contained in the act, intituled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," except that, in such case, no oath or affirmation shall be required that the said boat belongs to a citizen or citizens of the United States.

SEC. 2. *And be it further enacted*, That the owner or owners of such steamboat, upon application for enrolment or license, shall give bond to the collector of the district, to and for the use of the United States, in the penalty of one thousand dollars, with sufficient surety, conditioned, that the said boat shall not be employed in other waters than the rivers and bays of the United States.

ACT OF 1813, CHAPTER XLII. (2 U. S. Stats. at Large, 809).

An Act for the Regulation of Seamen on board the Public and Private Vessels of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ on board any of the public or private vessels of the United States any person or persons except citizens of the United States, or persons of color, natives of the United States.

SEC. 2. *And be it further enacted*, That from and after the time when this act shall take effect, it shall not be lawful to employ as aforesaid, any naturalized citizen of the United States, unless such citizen shall produce to the commander of the public vessel, if to be employed on board such vessel, or to a collector of the customs, a certified copy of the act by which he shall have been naturalized, setting forth such naturalization and the time thereof.

SEC. 3. *And be it further enacted*, That in all cases of private vessels of the United States sailing from a port in the United States to a foreign port, the list of the crew, made as heretofore directed by law, shall be examined by the collector for the district from which the vessel shall clear out, and, if approved of by him, shall be certified accordingly. And no person shall be admitted or employed as aforesaid, on board of any vessel aforesaid, unless his name shall have been entered in the list of the crew, approved and certified by the collector for the district from which the vessel shall clear out as aforesaid. And the said collector, before he delivers the list of the crew, approved and certified as aforesaid, to the captain, master, or proper officer of the vessel to which the

same belongs, shall cause the same to be recorded in a book by him for that purpose to be provided, and the said record shall be open for the inspection of all persons, and a certified copy thereof shall be admitted in evidence in any court in which any question may arise, under any of the provisions of this act.

SEC. 4. *And be it further enacted*, That the President of the United States be, and he hereby is authorized from time to time to make such further regulations, and to give such directions to the several commanders of public vessels, and to the several collectors, as may be proper and necessary respecting the proofs of citizenship, to be exhibited to the commanders or collectors aforesaid: *Provided*, That nothing contained in such regulations or directions shall be repugnant to any of the provisions of this act.

SEC. 5. *And be it further enacted*, That from and after the time when this act shall take effect, no seaman or other seafaring man, not being a citizen of the United States, shall be admitted or received as a passenger on board of any public or private vessel of the United States, in a foreign port, without permission in writing from the proper officers of the country of which such seaman or seafaring man may be subject or citizen.

SEC. 6. *And be it further enacted*, That from and after the time when this act shall take effect, the consuls or commercial agents of any nation at peace with the United States shall be admitted (under such regulations as may be prescribed by the President of the United States) to state their objections to the proper commander or collector as aforesaid, against the employment of any seaman or sea-faring man on board of any public or private vessel of the United States, on account of his being a native subject or citizen of such nation, and not embraced within the description of persons who may be lawfully employed, according to the provisions of this act; and the said consuls or commercial agents shall also be admitted under the said regulations, to be present at the time when the proofs of citizenship of the persons against whom such objections may have been made, shall be investigated by such commander or collector.

SEC. 7. *And be it further enacted*, That if any commander of a public vessel of the United States, shall knowingly employ or permit to be employed, or shall admit or receive, or permit to be admitted or received, on board his vessel, any person whose employment or admission is prohibited by the provisions of this act, he shall on conviction thereof forfeit and pay the sum of one thousand dollars for each person thus unlawfully employed or admitted on board such vessel.

SEC. 8. *And be it further enacted*, That if any person shall, contrary to the prohibitions of this act, be employed, or be received on board of

any private vessel, the master or commander, and the owner or owners of such vessel, knowing thereof, shall respectively forfeit and pay five hundred dollars for each person thus unlawfully employed or received in any one voyage; which sum or sums shall be recovered, although such seaman or person shall have been admitted and entered in the certified list of the crew aforesaid, by the collector for the district to which the vessel may belong: and all penalties and forfeitures arising under or incurred by virtue of this act, may be sued for, prosecuted, and recovered, with costs of suit by action of debt, and shall accrue and be one moiety thereof to the use of the person who shall sue for the same, and the other moiety thereof to the use of the United States.

SEC. 9. *And be it further enacted*, That nothing in this act contained shall be construed to prohibit any commander or master of a public or private vessel of the United States, whilst in a foreign port or place, from receiving any American seamen in conformity to law, or supplying any deficiency of seamen on board such vessel, by employing American seamen, or subjects of such foreign country, the employment of whom shall not be prohibited by the laws thereof.

SEC. 10. *And be it further enacted*, That the provisions of this act shall have no effect or operation with respect to the employment as seamen of the subjects or citizens of any foreign nation which shall not, by treaty or special convention with the government of the United States, have prohibited on board of her public and private vessels the employment of native citizens of the United States, who have not become a citizen or subject of such nation.

SEC. 11. *And be it further enacted*, That nothing in this act contained shall be so construed as to prevent any arrangement between the United States and any foreign nation, which may take place under any treaty or convention, made and ratified in the manner prescribed by the constitution of the United States.

SEC. 12. *And be it further enacted*, That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years, out of the territory of the United States.

SEC. 13. *And be it further enacted*, That if any person shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged, or counterfeited, any certificate or evidence of citizenship referred to in this act; or shall pass, utter, or use as true, any false, forged, or counterfeited certificate of citizenship, or shall make sale or dispose of any certificate of citizenship to any person other than the person for

whom it was originally issued, and to whom it may of right belong, every such person shall be deemed and adjudged guilty of felony; and on being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a period not less than three, or more than five years, or be fined in a sum not less than five hundred dollars, nor more than one thousand dollars, at the discretion of the court taking cognizance thereof.

SEC. 14. *And be it further enacted*, That no suit shall be brought for any forfeiture or penalty incurred under the provisions of this act, unless the suit be commenced within three years from the time of the forfeiture.

ACT OF 1813, CHAPTER II. (3 U. S. Stats. at Large, 2).

An Act for the government of Persons in certain Fisheries.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the master or skipper of any vessel of the burden of twenty tons or upwards, qualified according to law for carrying on the bank and other cod fisheries, bound from a port of the United States to be employed in any such fishery, at sea, shall, before proceeding on such fishing voyage, make an agreement in writing or print with every fisherman who may be employed therein (except only an apprentice or servant of himself or owner), and, in addition to such terms of shipment as may be agreed on, shall in such agreement express whether the same is to continue for one voyage or for the fishing season, and shall also express, that the fish or the proceeds of such fishing voyage or voyages, which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught; which agreement shall be indorsed or countersigned by the owner of such fishing vessel or his agent. And if any fisherman, having engaged himself for a voyage or for the fishing season, in any fishing vessel, and signed an agreement therefor as aforesaid, shall thereafter and while such agreement remains in force and to be performed, desert or absent himself from such vessel without leave of the master or skipper thereof, or of the owner or his agent, such deserter shall be liable to the same penalties as deserting seamen or mariners are subject to in the merchant service, and may in the like manner, and upon the like complaint and proof, be apprehended and detained; and all costs of process and commitment, if paid by the master or owner, shall be deducted out of the share of fish, or proceeds of any fishing voyage to which such deserter had or shall become entitled. And any fisher-

man, having engaged himself as aforesaid, who shall during such fishing voyage refuse or neglect his proper duty on board the fishing vessel, being thereto ordered or required by the master or skipper thereof, or shall otherwise resist his just commands to the hinderance or detriment of such voyage, besides being answerable for all damages arising thereby, shall forfeit to the use of the owner of such vessel his share of any public allowance which may be paid upon such voyage.

SEC. 2. *And be it further enacted*, That where an agreement or contract shall be so made and signed for a fishing voyage or for the fishing season, and any fish which may have been caught on board such vessel during the same, shall be delivered to the owner or to his agent for cure, and shall be sold by said owner or agent, such vessel shall, for the term of six months after such sale, be liable and answerable for the skipper's and every other fisherman's share of such fish, and may be proceeded against in the same form and to the same effect as any other vessel is by law liable and may be proceeded against for the wages of seamen or mariners in the merchant service. And upon such process for the value of a share or shares of the proceeds of fish delivered and sold as aforesaid, it shall be incumbent on the owner or his agent to produce a just account of the sales and division of such fish according to such agreement or contract; otherwise the said vessel shall be answerable upon such process for what may be the highest value of the share or shares demanded. But in all cases the owner of such vessel or his agent, appearing to answer to such process, may offer thereupon his account of general supplies made for such fishing voyage and of other supplies therefor made to either of the demandants, and shall be allowed to produce evidence thereof in answer to their demands respectively; and judgment shall be rendered upon such process for the respective balances which upon such an inquiry shall appear: *Provided always*, That when process shall be issued against any vessel liable as aforesaid, if the owner thereof, or his agent, will give bond to each fisherman in whose favor such process shall be instituted with sufficient security, to the satisfaction of two justices of the peace, one of whom shall be named by such owner or agent, and the other by the fisherman or fishermen pursuing such process, or if either party shall refuse, then the justice first appointed shall name his associate, with condition to answer and pay whatever sum shall be recovered by him or them on such process, there shall be an immediate discharge of such vessel: *Provided*, That nothing herein contained shall prevent any fisherman from having his action at common law for his share or shares of fish or the proceeds thereof as aforesaid.

ACT OF 1813, CHAPTER XXXV. (3 U. S. Stats. at Large, 49).

An Act laying a duty on imported Salt; granting a bounty on Pickled Fish exported, and allowances to certain Vessels employed in the Fisheries.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of January next, a duty of twenty cents per bushel shall be laid, imposed, and collected, upon all salt imported from any foreign port or place into the United States. In calculating the said duty, every fifty-six pounds of salt shall be computed as equal to one bushel. And the said duty shall be collected in the same manner, and under the same regulations as other duties laid on the importation of foreign goods, wares, and merchandise, into the United States: *Provided*, That drawback shall in no case be allowed, and the term of credit for the payment of duties shall be nine months.

SEC. 2. *And be it further enacted*, That on all pickled fish of the fisheries of the United States, exported therefrom subsequent to the last day of December, one thousand eight hundred and fourteen, there shall be allowed and paid a bounty of twenty cents per barrel, to be paid by the collector of the district from which the same shall be so exported, without any deduction or abatement: *Provided always*, That in order to entitle the exporter or exporters of such pickled fish to the benefit of such bounty or allowance, the said exporter or exporters shall make entry with the collector and naval officer of the district from whence the said pickled fish are intended to be exported; and shall specify in such entry the names of the master and vessel in which, and the place where such fish are intended to be exported, together with the particular quantity; and proof shall be made to the satisfaction of the collector of the district from which such pickled fish are intended to be exported, and of the naval officer thereof, if any, that the same are of the fisheries of the United States; and no entry shall be received as aforesaid, of any pickled fish which have not been inspected and marked pursuant to the inspection laws of the respective States where inspection laws are in force, in regard to any pickled fish, and the casks containing such fish shall be branded with the words "for bounty," with the name of the inspector or packer, the species and quality of the fish contained therein, and the name of the port of exportation; and the collector of such district shall, together with the naval officer, where there is one, grant an order or permit for an inspector to examine the pickled fish as expressed in such entry, and if they correspond therewith, and the said officer is fully satisfied that they are of the fisheries of the United States, to lade the same agreeably to such entry, on board the ship or vessel therein expressed; which lading shall

be performed under the superintendence of the officer examining the same, who shall make returns of the quantity and quality of pickled fish so laden on board, in virtue of such order or permit, to the officer or officers granting the same. And the said exporter or exporters, when the lading is completed, and after returns thereof have been made as above directed, shall make oath or affirmation, that the pickled fish expressed in such entry, and then actually laden on board the ship or vessel as therein expressed, are truly and *bonâ fide* of the fisheries of the United States, that they are truly intended to be exported as therein specified, and are not intended to be relanded within the limits of the United States; and shall also give bond in double the amount of the bounty or allowance to be received, with one or more sureties to the satisfaction of the collector of the port or place from which the said pickled fish are intended to be exported, conditioned that the same shall be landed and left at some foreign port or place without the limits aforesaid; which bonds shall be cancelled at the same periods and in like manner as is provided in respect to bonds given on the exportation of goods, wares, and merchandise, entitled to drawback of duties: *Provided always*, That the said bounty or allowance shall not be paid until at least six months after the exportation of such pickled fish, to be computed from the date of the bond, and until the exporter or exporters thereof shall produce to the collector with whom such outward entry is made, such certificates or other satisfactory proof of the landing of the same as aforesaid, as is made necessary for cancelling the bonds given on the exportation of goods entitled to drawback: *And provided also*, That the bounty or allowance as aforesaid, shall not be paid unless the same shall amount to ten dollars at least upon each entry.

Sec. 3. *And be it further enacted*, That no bounty, drawback, or allowance, shall be made under the authority of this act, unless it shall be proved to the satisfaction of the collector that the pickled fish for which the bounty, drawback, or allowance, shall be claimed, was wholly cured with foreign salt, and on which a duty shall have been secured or paid.

Sec. 4. *And be it further enacted*, That if any pickled fish shall be falsely or fraudulently entered with intent to obtain the bounty or allowance on their exportation as here provided, when the said fish are not entitled to the same, the said fish or the value thereof, to be recovered of the person making such false entry, shall be forfeited.

Sec. 5. *And be it further enacted*, That from and after the last day of December, one thousand eight hundred and fourteen, there shall be paid on the last day of December, annually, to the owner of every vessel or his agent, by the collector of the district where such vessel may belong, that shall be qualified agreeably to law for carrying on the bank and other cod fisheries, and that shall actually have been employed therein at sea

for the term of four months, at the least, of the fishing season next preceding, which season is accounted to be from the last day of February to the last day of November in every year, for each and every ton of such vessel's burden according to her admeasurement as licensed or enrolled, if of twenty tons and not exceeding thirty tons, two dollars and forty cents; and if above thirty tons, four dollars; of which allowance aforesaid three eighth parts shall accrue and belong to the owner of such fishing vessel, and the other five eighths thereof shall be divided by him, his agent, or lawful representative, to and among the several fishermen, who shall have been employed in such vessel during the season aforesaid, or a part thereof, as the case may be, in such proportions as the fish they shall respectively have taken may bear to the whole quantity of fish taken on board such vessel during such season: *Provided*, That the allowance aforesaid on any one vessel for one season, shall not exceed two hundred and seventy-two dollars.

Sec. 6. *And be it further enacted*, That from and after the last day of December, one thousand eight hundred and fourteen, there shall also be paid on the last day of December annually, to the owner of every fishing boat or vessel of more than five tons and less than twenty tons, or to his agent or lawful representative, by the collector of the district where such boat or vessel may belong, the sum of one dollar and sixty cents upon every ton admeasurement of such boat or vessel, which allowance shall be accounted for as part of the proceeds of the fares of said boat or vessel, and shall accordingly be so divided among all persons interested therein: *Provided, however*, That this allowance shall be made only to such boats or vessels as shall have been actually employed at sea in the cod fishery for the term of four months at the least of the preceding season: *And provided also*, That such boat or vessel shall have landed in the course of said preceding season, a quantity of fish not less than twelve quintals for every ton of her admeasurement; the said quantity of fish to be ascertained when dried and cured fit for exportation, and according to the weight thereof as the same shall weigh at the time of delivery when actually sold, which account of the weight, with the original adjustment and settlement of the fare or fares among the owners and fishermen, together with a written account of the length, breadth, and depth of said boat or vessel, and the time she has actually been employed in the fishery in the preceding season, shall in all cases be produced and sworn or affirmed to before the said collector of the district, in order to entitle the owner, his agent, or lawful representative to receive the allowances aforesaid. And if at any time within one year after payment of such allowance it shall appear that any fraud or deceit has been practised in obtaining the same, the boat or vessel upon which such allowance shall have been paid, if found within the district aforesaid, shall be forfeited, other-

wise the owner or owners having practised such fraud or deceit, shall forfeit and pay one hundred dollars, to be sued for, recovered, and distributed in the same manner as forfeitures and penalties are to be sued for, recovered, and distributed for any breach of the act, intituled "An act to regulate the collection of duties on imports and tonnage."

SEC. 7. *And be it further enacted*, That the owner or owners of every fishing vessel of twenty tons and upwards, his or their agent or lawful representative, shall, previous to receiving the allowance made by this act, produce to the collector who is authorized to pay the same, the original agreement or agreements which may have been made with the fishermen employed on board such vessel as is herein before required, and also a certificate, to be by him or them subscribed, therein mentioning the particular days on which such vessel sailed and returned on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he or they shall swear or affirm before the collector aforesaid.

SEC. 8. *And be it further enacted*, That no ship or vessel of twenty tons or upwards, employed as aforesaid, shall be entitled to the allowance granted by this act, unless the skipper or master thereof shall, before he proceeds on any fishing voyage, make an agreement in writing or in print, with every fisherman employed therein according to the provisions of the act, intituled "An act for the government of persons in certain fisheries."

SEC. 9. *And be it further enacted*, That any person who shall make any false declaration in any oath or affirmation required by this act, being duly convicted thereof in any court of the United States having jurisdiction of such offence, shall be deemed guilty of wilful and corrupt perjury and shall be punished accordingly.

SEC. 10. *And be it further enacted*, That this act shall continue in force until the termination of the war in which the United States are now engaged with the United Kingdom of Great Britain and Ireland, and the dependencies thereof, and for one year thereafter and no longer.

ACT OF 1816, CHAPTER XIV. (3 U. S. Stats. at Large, 254).

An Act to continue in force "An Act entitled An Act, laying a duty on imported Salt, granting a bounty on Pickled Fish exported, and allowances to certain Vessels employed in the Fisheries."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act, entitled "An act laying a duty on imported salt, granting a bounty on pickled fish exported, and allowances to certain vessels employed in the fisheries," passed on the

twenty-ninth day of July, in the year one thousand eight hundred and thirteen, shall be, and the same is hereby continued in force, any thing in the said act to the contrary thereof in anywise notwithstanding.

ACT OF 1817, CHAPTER XXXI. (3 U. S. Stats. at Large, 351).

An Act concerning the Navigation of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That after the thirtieth day of September next, no goods, wares, or merchandise, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country, of which the goods are the growth, production, or manufacture; or from which such goods, wares, or merchandise, can only be, or most usually are, first shipped for transportation: *Provided, nevertheless*, That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt a similar regulation.

SEC. 2. *And be it further enacted*, That all goods, wares, or merchandise, imported into the United States contrary to the true intent and meaning of this act, and the ship or vessel wherein the same shall be imported, together with her cargo, tackle, apparel, and furniture, shall be forfeited to the United States; and such goods, wares, or merchandise, ship, or vessel, and cargo, shall be liable to be seized, prosecuted, and condemned, in like manner, and under the same regulations, restrictions, and provisions, as have been heretofore established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws.

SEC. 3. *And be it further enacted*, That after the thirtieth day of September next, the bounties and allowances now granted by law to the owners of boats or vessels engaged in the fisheries, shall be paid only on boats or vessels, the officers and at least three fourths of the crews of which shall be proved to the satisfaction of the collector of the district where such boat or vessel shall belong, to be citizens of the United States, or persons not the subjects of any foreign prince or State.

SEC. 4. *And be it further enacted*, That no goods, wares, or merchandise, shall be imported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power; but this clause shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no goods,

wares, or merchandise, other than those imported in such vessel from some foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States.

SEC. 5. *And be it further enacted*, That after the thirtieth day of September next, there shall be paid a duty of fifty cents per ton upon every ship or vessel of the United States, which shall be entered in a district in one State from a district in another State, except it be an adjoining State on the sea-coast, or on a navigable river or lake, and except also it be a coasting vessel going from Long Island, in the State of New York, to the State of Rhode Island, or from the State of Rhode Island to the said Long Island, having on board goods, wares, and merchandise, taken in one State, to be delivered in another State: *Provided*, That it shall not be paid on any ship or vessel having a license to trade between the different districts of the United States, or to carry on the bank or whale fisheries, more than once a year; *And provided also*, That if the owner of any such vessel, or his agent, shall prove, to the satisfaction of the collector, that three fourths at least of the crew thereof are American citizens, or persons not the subjects of any foreign prince or State, the duty to be paid in such case shall be only at the rate of six cents per ton; but nothing in this section shall be construed to repeal or affect any exemption from tonnage duty given by the eighth section of the act, entitled "An act to provide for the establishment of certain districts, and therein to amend an act, entitled An act to regulate the collection of duties on imports and tonnage, and for other purposes."

SEC. 6. *And be it further enacted*, That after the thirtieth day of September next, there shall be paid upon every ship or vessel of the United States, which shall be entered in the United States, from any foreign port or place, unless the officers, and at least two thirds of the crew thereof, shall be proved citizens of the United States, or persons not the subjects of any foreign prince or State, to the satisfaction of the collector, fifty cents per ton; *And provided also*, That this section shall not extend to ships or vessels of the United States which are now on foreign voyages, or which may depart from the United States prior to the first day of May next, until after their return to some port of the United States.

SEC. 7. *And be it further enacted*, That the several bounties and remissions, or abatements of duty, allowed by this act, in the case of vessels having a certain proportion of seamen who are American citizens, or persons not the subjects of any foreign power, shall be allowed only in the case of vessels having such proportion of American seamen during their whole voyage, unless in case of sickness, death, or desertion, or where the whole or part of the crew shall have been taken prisoners in the voyage.

ACT OF 1819, CHAPTER XLVIII. (3 U. S. Stats. at Large, 492).

An Act supplementary to the Acts concerning the Coasting Trade.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That for the more convenient regulation of the coasting trade, the sea-coast and navigable rivers of the United States be, and hereby are, divided into two great districts; the first, to include all the districts on the sea-coast and navigable rivers, between the eastern limits of the United States and the southern limits of Georgia, and the second, to include all the districts on the sea-coast and navigable rivers, between the river Perdido and the western limits of the United States.

SEC. 2. *And be it further enacted,* That every ship or vessel, of the burden of twenty tons or upwards, licensed to trade between the different districts of the United States, shall be, and is hereby authorized to carry on such trade between the districts included within the aforesaid great districts respectively, and between a State in one, and an adjoining State in another, great district, in manner, and subject only to the regulations that are, now by law required to be observed by such ships or vessels, in trading from one district to another in the same State, or from a district in one State to a district in the next adjoining State, any thing in any law to the contrary, notwithstanding.

SEC. 3. *And be it further enacted,* That every ship or vessel, of the burden of twenty tons or upwards, licensed to trade as aforesaid, shall be, and is hereby, required, in trading from one to another great district, other than between a State in one, and an adjoining State in another, great district, to conform to and observe the regulations, that, at the time of passing this act, are required to be observed by such vessels in trading from a district in one State to a district in any other than an adjoining State.

SEC. 4. *And be it further enacted,* That the trade between the districts not included in either of the two great districts aforesaid, shall continue to be carried on in the manner, and subject to the regulations, already provided for this purpose.

SEC. 5. *And be it further enacted,* That this act shall commence and be in force, from and after the thirtieth day of June next after the passing thereof.

ACT OF 1819, CHAPTER LXXVII. (3 U. S. Stats. at Large, 510).

An Act to protect the Commerce of the United States, and punish the crime of Piracy.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and hereby is, authorized and requested to employ so many of the public armed vessels, as, in his judgment, the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations.

SEC. 2. *And be it further enacted*, That the President of the United States be, and hereby is, authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.

SEC. 3. *And be it further enacted*, That the commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same; and may also retake any vessel, owned as aforesaid, which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

SEC. 4. *And be it further enacted*, That whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

SEC. 5. *And be it further enacted*, That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as

defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.

SEC. 6. *And be it further enacted*, That this act shall be in force until the end of the next session of congress.

ACT OF 1819, CHAPTER LXXXIX. (3 U. S. Stats. at Large, 520).

An Act in addition to, and alteration of an Act, entitled "An Act laying a Duty on Imported Salt, granting a Bounty on Pickled Fish exported, and allowances to certain Vessels employed in the Fisheries."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passing of this act, there shall be paid, on the last day of December, annually, to the owner of every fishing boat or vessel, or his agent, by the collector of the district where such boat or vessel may belong, that shall be qualified, agreeably to law, for carrying on the bank and other cod fisheries, and that shall actually have been employed therein, at sea, for the term of four months at least, of the fishing season next preceding, which season is accounted to be from the last day of February to the last day of November in every year, for each and every ton of such boats or vessels, burden according to her admeasurement as licensed or enrolled, if of more than five tons, and not exceeding thirty tons, three dollars and fifty cents; if above thirty tons, four dollars; and if above thirty tons, and having had a crew of not less than ten persons, and having been actually employed in the cod fishery, at sea, for the term of three and one half months, at the least, but less than four months, of the season aforesaid, three dollars and fifty cents: *Provided*, That the allowance aforesaid, on any one vessel, for one season, shall not exceed three hundred and sixty dollars.

SEC. 2. *And be it further enacted*, That such parts of the fifth and sixth sections of the act hereby amended, as are contrary to the provisions of this act, be, and the same are hereby repealed.

ACT OF 1820, CHAPTER XI. (3 U. S. Stats. at Large, 541).

An Act to provide for obtaining accurate statements of the Foreign Commerce of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the register of the treasury shall, under the direction of the secretary of the treasury, annually prepare statistical accounts of the commerce of the United States with foreign countries, for each preceding year; which accounts shall be laid before congress, by the secretary of the treasury, on the first Monday of December in every year, or as soon after as possible.

SEC. 2. *And be it further enacted*, That such accounts shall comprehend and state all goods, wares, and merchandise, exported from the United States to other countries; all goods, wares, and merchandise, imported into the United States from other countries; and all navigation employed in the foreign trade of the United States; which facts shall be stated according to the principles, and in the manner, hereby directed.

SEC. 3. *And be it further enacted*, That the kinds, quantities, and values, of all articles exported, and the kinds, quantities, and values, of all articles imported, shall be distinctly stated in such accounts; except in cases in which it may appear to the secretary of the treasury that separate statements of the species, quantities, or values, of any particular articles, would swell the annual statements without utility; and, in such cases, the kinds and total values of such articles shall be stated together, or in such classes as the secretary of the treasury may think fit.

SEC. 4. *And be it further enacted*, That the exports shall be so stated as to show the exports to each foreign country, and their values; and that the imports shall be so stated, as to show the imports from each foreign country, and their values.

SEC. 5. *And be it further enacted*, That the exports shall be so stated, as to show, separately, the exports of articles of the production or manufacture of the United States, and their values; and the exports of articles of the production or manufacture of foreign countries, and their values.

SEC. 6. *And be it further enacted*, That the navigation, employed in the foreign trade of the United States, shall be stated in such manner, as to show the amount of the tonnage of all vessels departing from the United States for foreign countries; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels; and also the foreign nations to which such foreign tonnage belongs, and the amount of such tonnage belonging to each foreign nation; and in such manner as also to show the amount of the ton-

nage of all vessels departing for every particular foreign country, with which the United States have any considerable commerce; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels; and, in such manner as to show the amount of the tonnage of all vessels arriving in the United States from foreign countries; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels; and, also, the foreign nations to which such foreign tonnage belongs, and the amount of such tonnage belonging to each foreign nation; and, in such manner, as also to show the amount of the tonnage of all vessels arriving from every particular foreign country, with which the United States have any considerable commerce; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels.

SEC. 7. *And be it further enacted*, That the kinds and quantities of all imported articles free from duty shall be ascertained by entry, made upon oath or affirmation, by the owner, or by the consignee or agent of the importer; or by actual examination, where the collector shall think such examination necessary: and that the values of all such articles shall be ascertained in the same manner in which the values of imports subject to duties ad valorem are ascertained.

SEC. 8. *And be it further enacted*, That the values of all imported articles subject to specific duties, shall be ascertained in the manner in which the values of imposts subject to duties ad valorem are ascertained.

SEC. 9. *And be it further enacted*, That the collectors shall keep separate accounts of the kinds, quantities, and values, of such parts of the imports subject to duties ad valorem, as may be directed by the secretary of the treasury.

SEC. 10. *And be it further enacted*, That all articles exported shall be valued at their actual cost, or the values which they may truly bear at the time of exportation, in the ports of the United States from which they are exported: and that all articles imported shall be valued at their actual cost, or the values which they may truly bear in the foreign ports from which they are exported for importation into the United States, at the time of such exportation.

SEC. 11. *And be it further enacted*, That before a clearance shall be granted for any vessel bound to a foreign place, the owners, shippers, or consignors, of the cargo on board of such vessel, shall deliver to the collector manifests of the cargo, or the parts thereof shipped by them respectively, and shall verify the same by oath or affirmation; and such manifests shall specify the kinds and quantities of the articles shipped by them respectively, and the value of the total quantity of each kind of

articles; and such oath or affirmation shall state that such manifest contains a full, just, and true account of all articles laden on board of such vessel by the owners, shippers, or consignors, respectively, and that the values of such articles are truly stated, according to their actual cost, or the values which they truly bear at the port and time of exportation; and, before a clearance shall be granted for any such vessel, the master of every such vessel, and the owners, shippers, and consignors of the cargo, shall state, upon oath or affirmation, to the collector, the foreign place or country in which such cargo is truly intended to be landed; and the said oaths or affirmations shall be taken and subscribed in writing.

SEC. 12. *And be it further enacted*, That every collector shall keep an accurate account of the national characters and tonnage of all vessels which depart from his district for foreign countries, and of the foreign places or countries for which such vessels depart; and, also, an accurate account of the national characters and tonnage of all vessels which enter his district from foreign countries, and of the foreign places or countries from which such vessels arrive.

SEC. 13. *And be it further enacted*, That the several collectors shall make quarter yearly returns to the register of the treasury, of all the facts and matters which they are hereby required to ascertain.

SEC. 14. *And be it further enacted*, That the secretary of the treasury shall give such directions to the collectors, and prescribe such rules and forms to be observed by them, as may appear to him proper for attaining the objects of this act: *Provided*, That such directions or rules shall not be contrary to the provisions of any law of the United States.

SEC. 15. *And be it further enacted*, That the forms of the annual statements hereby required, shall be determined by the secretary of the treasury, who shall prescribe such forms as may be proper to exhibit the facts hereby required to be stated in the clearest manner, and to show the actual state of commerce and navigation between the United States and foreign countries in each year.

SEC. 16. *And be it further enacted*, That this act shall be in force from the thirtieth day of September next.

ACT OF 1825, CHAPTER LXV. (4 U. S. Stats. at Large, 115).

An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes.

SEC. 4. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United

States, and out of the jurisdiction of any particular State, shall commit the crime of wilful murder, or rape, or shall, wilfully and maliciously, strike, stab, wound, poison, or shoot at, any other person, of which striking, stabbing, wounding, poisoning, or shooting such person shall afterwards die, upon land, within or without the United States, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death.

SEC. 5. *And be it further enacted*, That if any offence shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign State or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offence shall be cognizable and punishable by the proper circuit court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or State: *Provided, always*, That if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent court of such foreign State or sovereign, he shall not be subject to another trial in any court of the United States.

SEC. 6. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall, by surprise or by open force or violence, maliciously attack, or set upon, any ship or vessel belonging in whole or part, to the United States, or to any citizen or citizens thereof, or to any other person whatsoever, with an intent unlawfully to plunder the same ship or vessel, or to despoil any owner or owners thereof of any moneys, goods, or merchandise, laden on board thereof, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony; and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.

SEC. 7. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any other of the places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any ship or vessel, boat or raft; or if any person or persons shall, wilfully and maliciously, cut, spoil, or destroy, any cordage, cable, buoys, buoy-rope, headfast, or other fast, fixed to any anchor or moorings, belonging to any ship, vessel, boat, or raft; every person, so

offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence.

Sec. 8. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any of the places aforesaid, shall buy, receive, or conceal, or aid in concealing any money, goods, bank-notes, or other effects or things which may be the subject of larceny, which have been feloniously taken or stolen, from any other person, knowing the same to have been taken or stolen, every person, so offending, shall be deemed guilty of a misdemeanor, and may be prosecuted therefor, although the principal offender chargeable, or charged with the larceny, shall not have been prosecuted or convicted thereof; and shall on conviction thereof, be punished by fine, not exceeding one thousand dollars, and imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence.

Sec. 9. *And be it further enacted*, That, if any person or persons shall plunder, steal, or destroy, any money, goods, merchandise, or other effects, from or belonging to any ship or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks, of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship, or vessel, boat, or raft, or the wreck thereof, or, if any person or persons shall hold out or show any false light, or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger, or distress, or shipwreck; every person, so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.

Sec. 10. *And be it further enacted*, That, if any master or commander of any ship or vessel, belonging, in whole, or in part, to any citizen or citizens of the United States, shall, during his being abroad, maliciously, and without justifiable cause, force any officer, or mariner of such ship or vessel, on shore, or leave him behind, in any foreign port or place, or refuse to bring home again, all such of the officers and mariners of such ship or vessel, whom he carried out with him, as are in a condition to return, and willing to return, when he shall be ready to proceed in his homeward voyage, every master or commander, so offending, shall, on conviction

thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding six months, according to the aggravation of the offence.

SEC. 11. *And be it further enacted*, That, if any person or persons, shall, wilfully and maliciously, set on fire, or burn, or otherwise destroy or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet, or assist in setting on fire, or burning, or otherwise destroying, any ship or vessel of war of the United States, afloat on the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, every person so offending, shall be deemed guilty of felony, and shall, on conviction thereof, suffer death: *Provided*, That nothing herein contained shall be construed to take away or impair the right of any court martial to punish any offence, which, by the law of the United States, may be punishable by such court.

SEC. 22. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States, or any citizen or citizens thereof, shall, with a dangerous weapon, or with intent to kill, rob, steal, or to commit a mayhem, or rape, or to perpetrate any other felony, commit an assault on another, such person shall, on conviction thereof, be punished by fine, not exceeding three thousand dollars, and by imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence.

SEC. 23. *And be it further enacted*, That, if any person or persons shall, on the high seas, or within the United States, wilfully and corruptly conspire, combine, and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or to procure the same to be done, with intent to injure any person, or body politic, that hath underwritten, or shall thereafterwards underwrite, any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person, or body politic, that hath lent or advanced, or thereafter shall lend or advance, any money on such vessel, on bottomry or respondentia, or shall, within the United States, build or fit out, or aid in building or fitting out, any ship or vessel, with intent that the same shall be cast away, burnt, or destroyed, for the purpose or with the design aforesaid, every person, so offending, shall, on conviction thereof, be deemed guilty of felony, and shall be punished by fine, not exceeding ten thousand dollars, and by imprisonment, and confinement to hard labor, not exceeding ten years.

ACT OF 1825, CHAPTER XCIX. (4 U. S. Stats. at Large, 129).

An Act to authorize the register or enrolment and license to be issued in the name of the President or Secretary of any incorporated Company owning a Steamboat or Vessel.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That enrolments and licenses for steamboats or vessels, owned by any incorporated company, may be issued in the name of the president or secretary of such company; and that such enrolments and licenses shall not be vacated or affected by a sale of any share or shares of any stockholder, or stockholders, in such company.

SEC. 2. *And be it further enacted*, That registers for steamboats or vessels, owned by any incorporated company, may be issued in the name of the president or secretary of such company; and that such register shall not be vacated or affected by a sale of any share or shares of any stockholder or stockholders in such company.

SEC. 3. *And be it further enacted*, That, upon the death, removal, or resignation, of the president or secretary of any incorporated company, owning any steamboat or vessel, a new register, or enrolment and license, as the case may be, shall be taken out for such steamboat or vessel.

SEC. 4. *And be it further enacted*, That, previously to granting a register, or enrolment and license, for any steamboat or vessel, owned by any company, the president or secretary of such company shall swear, or affirm, as to the ownership of such steamboat or vessel, by such company, without designating the names of the persons composing such company; which oath, or affirmation, shall be deemed sufficient, without requiring the oath or affirmation of any other person interested or concerned in such steamboat or vessel.

SEC. 5. *And be it further enacted*, That, before granting a register for any steamboat or vessel, so owned by any incorporated company, the president or secretary thereof shall swear, or affirm, that, to the best of his knowledge and belief, no part of such steamboat or vessel has been, or is then, owned by any foreigner or foreigners.

ACT OF 1828, CHAPTER CXIX. (4 U. S. Stats. at Large, 312).

An Act to authorize the licensing of Vessels to be employed in the Mackerel Fishery.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, from and after the passage of this act, it shall be the duty of the collector of the district to which any

vessel may belong, on an application for that purpose by the master or owner thereof, to issue a license for carrying on the mackerel fishery, to such vessel, in the form prescribed by the act, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," passed the eighteenth day of February, one thousand seven hundred and ninety-three: *Provided*, That all the provisions of said act, respecting the licensing of ships or vessels for the coasting trade and fisheries, shall be deemed and taken to be applicable to licenses and to vessels licensed for carrying on the mackerel fishery.

ACT OF 1829, CHAPTER XLI. (4 U. S. Stats. at Large, 359).

An Act to provide for the apprehension and delivery of Deserters from certain Foreign Vessels in the ports of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on application of a consul or vice-consul of any foreign government, having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of said vessel, it shall be the duty of any court, judge, justice, or other magistrate, having competent power, to issue warrants to cause the said person to be arrested for examination; and if, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the said consul or vice-consul, to be sent back to the dominions of any such government, or, on the request, and at the expense, of the said consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government: *Provided nevertheless*, That no person shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause: *And provided further*, That if any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect.

ACT OF 1830, CHAPTER XIV. (4 U. S. Stats. at Large, 372).

An Act to authorize Surveyors, under the direction of the Secretary of the Treasury, to enroll and license Ships or Vessels to be employed in the Coasting Trade and Fisheries.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, after the passage of this act, the secretary of the treasury be, and he is hereby, invested with powers to authorize the surveyor of any port of delivery, under such regulations as he shall deem necessary, to enroll and license ships or vessels to be employed in the coasting trade and fisheries, in like manner as collectors of ports of entry are now authorized to do, under existing laws.

SEC. 2. *And be it further enacted*, That any surveyor who shall perform the duties directed to be performed by the first section of this act, shall be entitled to receive the same commissions and fees, as are now allowed by law to collectors for performing the same duties, and no more.

ACT OF 1831, CHAPTER XX. (4 U. S. Stats. at Large, 441).

An Act to repeal the charges imposed on Passports and Clearances.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, so much of the act of the first of June, one thousand seven hundred and ninety-six, entitled "An act providing passports for the ships and vessels of the United States," as imposes a charge of ten dollars for passports, and of four dollars for a clearance, to any ship or vessel bound on a voyage to any foreign country, be, and the same is hereby repealed, to take effect from and after the thirty-first day of March of the present year.

ACT OF 1831, CHAPTER XCVIII. (4 U. S. Stats. at Large, 487).

An Act to regulate the Foreign and Coasting Trade on the Northern, North-Eastern, and North-Western frontiers of the United States, and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, from and after the first day of April next, no custom-house fees shall be levied or collected on any raft, flat, boat, or vessel, of the United States, entering otherwise than by sea, at any port of the United States on the rivers and lakes on our northern, north-eastern, and north-western frontiers.

SEC. 2. *And be it further enacted*, That, from and after the first day of April next, the same and no higher tonnage duties and custom-house charges of any kind shall be levied and collected on any British colonial raft, flat, boat, or vessel, entering otherwise than by sea at any port of the United States on the rivers and lakes on our northern, north-eastern, and north-western frontiers, than may be levied and collected on any raft, flat, boat, or vessel, entering otherwise than by sea at any of the ports of the British possessions on our northern, north-eastern, and north-western frontiers: and that, from and after the first day of April next, no higher discriminating duty shall be levied or collected on merchandise imported into the United States in the ports aforesaid, and otherwise than by sea, than may be levied and collected on merchandise when imported in like manner otherwise than by sea, into the British possessions on our northern, north-eastern, and north-western frontiers from the United States.

SEC. 3. *And be it further enacted*, That, from and after the passage of this act, any boat, sloop, or other vessel, of the United States, navigating the waters on our northern, north-eastern, and north-western frontiers, otherwise than by sea, shall be enrolled and licensed in such form as may be prescribed by the secretary of the treasury; which enrolment and license shall authorize any such boat, sloop, or other vessel, to be employed either in the coasting or foreign trade; and no certificate of registry shall be required for vessels so employed on said frontiers: *Provided*, That such boat, sloop, or vessel, shall be in every other respect liable to the rules, regulations, and penalties, now in force, relating to registered vessels on our northern, north-eastern, and north-western frontiers.

SEC. 4. *And be it further enacted*, That in lieu of the fees, emoluments, salary, and commissions, now allowed by law to any collector or surveyor of any district on our northern, north-eastern, and north-western lakes and rivers, each collector or surveyor, as aforesaid, shall receive, annually, in full compensation for these services, an amount equal to the entire compensation received by such officer during the past year.

ACT OF 1831, CHAPTER CXV. (4 U. S. Stats. at Large, 492).

An Act concerning Vessels employed in the Whale Fishery.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of the act, entitled "An act to authorize the register or enrolment, and license, to be issued in the name of the president or secretary of any incorporated company owning a steamboat or vessel," passed the third day of March,

one thousand eight hundred and twenty-five, shall extend and be applicable to every ship or vessel owned by any incorporated company, and employed wholly in the whale fishery, so long as such ship or vessel shall be wholly employed in the whale fishery.

ACT OF 1835, CHAPTER XL. (4 U. S. Stats. at Large, 775).

An Act in amendment of the Acts for the punishment of offences against the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That if any one or more of the crew of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony; and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars; and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence. And the offence of making a revolt in a ship, which now is, under and in virtue of the eighth section of the act of Congress, passed the thirtieth day of April, in the year of our Lord one thousand seven hundred and ninety, punishable as a capital offence, shall, from and after the passage of the present act, be no longer punishable as a capital offence, but shall be punished in the manner prescribed in the present act, and not otherwise.

SEC. 2. *And be it further enacted*, That if any one or more of the crew of any American ship or vessel on the high seas, or any other waters, within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire, or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite, or stir up any other or others of the crew to disobey or resist the lawful orders of the master, or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust therein, or shall assemble with others in a tumultuous and mutinous manner, or make a riot on board thereof, or shall unlawfully confine the master, or other commanding officer thereof, every such person so offending shall, on

conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

SEC. 3. *And be it further enacted*, That if any master or other officer, of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison, any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

SEC. 4. *And be it further enacted*, That whenever any person indicted for any offence against the United States, whether capital or otherwise, shall upon his arraignment stand mute, or will not plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party shall plead not guilty, or such plea shall be entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury. And in all trials in capital cases, if the party indicted shall peremptorily challenge above the number of jurors allowed by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if the same [said] challenges had not been made.

SEC. 5. *And be it further enacted*, That whenever any person shall be convicted of any offence against the United States which is punishable by fine and imprisonment, or by either, it shall be lawful for the court by which the sentence is passed, to order the sentence to be executed in any house of correction, or house of reformation for juvenile delinquents within the State or district where such court is holden, the use of which shall be allowed and authorized by the legislature of the State for such purpose. And the expenses attendant upon the execution of such sentence shall be paid by the United States.

ACT OF 1836, CHAPTER LV. (5 U. S. Stats. at Large, 16).

An Act in addition to the Act of the twenty-fourth of May, one thousand eight hundred and twenty-eight, entitled "An Act to authorize the Licensing of Vessels to be employed in the Mackerel Fishery."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That vessels duly licensed

under the provisions of "An act to authorize the licensing of vessels to be employed in the mackerel fishery," passed May twenty-fourth, one thousand eight hundred and twenty-eight, shall not be deemed or taken to be liable to the forfeitures imposed by the fifth and thirty-second sections of the act of Congress, approved the eighteenth day of February, one thousand seven hundred and ninety-three, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," in consequence of any such vessel, whilst licensed as aforesaid, having been engaged in catching cod, or fish of any other description whatever, *Provided, however*, That this act shall not be deemed or considered as authorizing or entitling the owner or owners of any vessel licensed for the mackerel fishery, to receive the bounty allowed by law to vessels employed in the cod fishery.

ACT OF 1837, CHAPTER XXI. (5 U. S. Stats. at Large, 153).

An Act to provide for the Enlistment of Boys for the Naval Service, and to extend the term of the Enlistment of Seamen.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful to enlist boys for the navy, with the consent of their parents or guardians, not being under thirteen, nor over eighteen years of age, to serve until they shall arrive at the age of twenty-one years; and it shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years, unless sooner discharged by direction of the President of the United States; and so much of an act entitled "An act to amend the act entitled 'An act to amend the act authorizing the employment of an additional naval force,'" approved fifteenth May, one thousand eight hundred and twenty, as is inconsistent with the provisions of this act, shall be, and is hereby repealed.

SEC. 2. *And be it further enacted*, That when the time of service of any person enlisted for the navy, shall expire, while he is on board any of the public vessels of the United States, employed on foreign service, it shall be the duty of the commanding officer of the fleet, squadron, or vessel, in which such person may be, to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer, immediately to make report to the navy department, of such detention and the causes thereof.

SEC. 3. *And be it further enacted*, That such persons as may be detained after the expiration of their enlistment, under the next preceding section of this act, shall be subject, in all respects, to the laws and regulations for the government of the navy, until their return to the United States, and all such persons as shall be so detained, and all such as shall voluntarily reënlist to serve until the return of the vessel in which they shall be serving, and their regular discharge therefrom in the United States, shall, while so detained and while so serving under their reënlistment, receive an addition of one fourth to their former pay.

ACT OF 1837, CHAPTER XXII. (5 U. S. Stats. at Large, 153).

An Act concerning Pilots.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters, which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port; any law, usage, or custom, to the contrary notwithstanding.

ACT OF 1838, CHAPTER CXCI. (5 U. S. Stats. at Large, 304).

An Act to provide for the better security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be the duty of all owners of steamboats, or vessels propelled in whole or in part by steam, on or before the first day of October, one thousand eight hundred and thirty-eight, to make a new enrolment of the same, under the existing laws of the United States, and take out from the collector or surveyor of the port, as the case may be, where such vessel is enrolled, a new license, under such conditions as are now imposed by law, and as shall be imposed by this act.

SEC. 2. *And be it further enacted*, That it shall not be lawful for the owner, master, or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares, and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters

of the United States, from and after the said first day of October, one thousand eight hundred and thirty-eight; without having first obtained, from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence.

Sec. 3. *And be it further enacted*, That it shall be the duty of the district judge of the United States, within whose district any ports of entry or delivery may be, on the navigable waters, bays, lakes, and rivers of the United States, upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by steam, to appoint, from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam engines, steamboat boilers, or other machinery belonging to steam vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection; such persons, before entering upon the duties enjoined by this act, shall make and subscribe an oath or affirmation before said district judge, or other officer duly authorized to administer oaths, well, faithfully, and impartially to execute and perform the services herein required of them.

Sec. 4. *And be it further enacted*, That the person or persons who shall be called upon to inspect the hull of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, give to the owner or master, as the case may be, a certificate, in which shall be stated the age of the said boat or vessel, when and where originally built, and the length of time the same has been running. And he or they shall also state whether, in his or their opinion, the said boat or vessel is sound, and in all respects sea-worthy, and fit to be used for the transportation of freight or passengers; for which service, so performed upon each and every boat or vessel, the inspectors shall each be paid and allowed by said master or owner applying for such inspection, the sum of five dollars.

Sec. 5. *And be it further enacted*, That the person or persons who shall be called upon to inspect the boilers and machinery of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, make a certificate, in which he or they shall state his or their opinion whether said boilers are sound and fit for use,

together with the age of said boilers; and duplicates thereof shall be delivered to the owner or master of such vessel, one of which it shall be the duty of the said master and owner to deliver to the collector or surveyor of the port whenever he shall apply for a license, or for a renewal of a license; the other he shall cause to be posted up, and kept in some conspicuous part of said boat, for the information of the public; and for each and every inspection so made, each of the said inspectors shall be paid by the said master or owner applying, the sum of five dollars.

Sec. 6. *And be it further enacted*, That it shall be the duty of the owners and masters of steamboats to cause the inspection provided under the fourth section of this act to be made at least once in every twelve months; and the examination required by the fifth section, at least once in every six months; and deliver to the collector or surveyor of the port where his boat or vessel has been enrolled or licensed, the certificate of such inspection; and, on a failure thereof, he or they shall forfeit the license granted to such boat or vessel, and be subject to the same penalty as though he had run said boat or vessel without having obtained such license, to be recovered in like manner. And it shall be the duty of the owners and masters of the steamboats licensed in pursuance of the provisions of this act, to employ on board of their respective boats a competent number of experienced and skilful engineers, and, in case of neglect to do so, the said owners and masters shall be held responsible for all damages to the property of any passenger on board of any boat occasioned by an explosion of the boiler or any derangement of the engine or machinery of any boat.

Sec. 7. *And be it further enacted*, That whenever the master of any boat or vessel, or the person or persons charged with navigating said boat or vessel, which is propelled in whole or in part by steam, shall stop the motion or headway of said boat or vessel, or when said boat or vessel shall be stopped for the purpose of discharging or taking in cargo, fuel, or passengers, he or they shall open the safety-valve, so as to keep the steam down in said boiler as near as practicable to what it is when the said boat or vessel is under headway, under the penalty of two hundred dollars for each and every offence.

Sec. 8. *And be it further enacted*, That it shall be the duty of the owner and master of every steam vessel engaged in the transportation of freight or passengers, at sea or on the lakes, Champlain, Ontario, Erie, Huron, Superior, and Michigan, the tonnage of which vessel shall not exceed two hundred tons, to provide and to carry with the said boat or vessel, upon each and every voyage, two long-boats or yawls, each of which shall be competent to carry at least twenty persons; and where the tonnage of said vessel shall exceed two hundred tons, it shall be the duty of the owner and master to provide and carry, as aforesaid, not less

than three long-boats or yawls, of the same or larger dimensions; and for every failure in these particulars, the said master and owner shall forfeit and pay three hundred dollars.

Sec. 9. *And be it further enacted*, That it shall be the duty of the master and owner of every steam vessel employed on either of the lakes mentioned in the last section, or on the sea, to provide, as a part of the necessary furniture, a suction hose and fire-engine and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order; and that iron rods or chains shall be employed and used in the navigating of all steamboats, instead of wheel or tiller ropes; and for a failure to do which, they, and each of them, shall forfeit and pay the sum of three hundred dollars.

Sec. 10. *And be it further enacted*, That it shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars.

Sec. 11. *And be it further enacted*, That the penalties imposed by this act may be sued for and recovered in the name of the United States, in the district or circuit court of such district or circuit where the offence shall have been committed, or forfeiture incurred, or in which the owner or master of said vessel may reside, one half to the use of the informer, and the other to the use of the United States; or the said penalty may be prosecuted for by indictment in either of the said courts.

Sec. 12. *And be it further enacted*, That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years.

Sec. 13. *And be it further enacted*, That in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam, shall be taken as full *primâ facie* evidence, sufficient to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment.

ACT OF 1840, CHAPTER VI. (5 U. S. Stats. at Large, 370).

An Act to cancel the bonds given to secure duties upon Vessels and their Cargoes, employed in the Whale Fishery, and to make registers, lawful papers for such Vessels.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all vessels which have cleared, or hereafter may clear, with registers for the purpose of engaging in the whale fishery, shall be deemed to have lawful and sufficient papers for such voyages, securing the privileges and rights of registered vessels, and the privileges and exemptions of vessels enrolled and licensed for the fisheries; and all vessels which have been enrolled and licensed for like voyages shall have the same privileges and measure of protection as if they had sailed with registers if such voyages are completed or until they are completed.

SEC. 2. *And be it further enacted*, That all the provisions of the first section of the act, entitled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," passed on the twenty-eighth day of February, Anno Domini eighteen hundred and three, shall hereafter apply and be in full force as to vessels engaged in the whale fishery in the same manner and to the same extent as the same is now in force and applies to vessels bound on a foreign voyage.

SEC. 3. *And be it further enacted*, That all forfeitures, fees, duties, and charges of every description required of the crews of such vessels, or assessed upon the vessels or cargoes, being the produce of such fishery, because of a supposed insufficiency of a register to exempt them from such claims, are hereby remitted; and all bonds given for such cause are hereby cancelled, and the secretary of the treasury is hereby required to refund all such moneys as have been, or which may be, paid into the treasury, to the rightful claimants, out of the revenues in his hands.

ACT OF 1840, CHAPTER XLVIII. (5 U. S. Stats. at Large, 394).

An Act in addition to the several Acts regulating the Shipment and Discharge of Seamen, and the duties of Consuls.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, As follows:

First. The duplicate list of the crew of any vessel bound on a foreign voyage, made out pursuant to the act of February twenty-eighth, eighteen

hundred and three, shall be a fair copy in one uniform handwriting, without erasure or interlineation.

Second. It shall be the duty of the owners of every such vessel to obtain from the collector of the customs of the district from which the clearance is made, a true and certified copy of the shipping articles, containing the names of the crew, which shall be written in a uniform hand, without erasures or interlineations.

Third. These documents which shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things, shall be produced by the master, and laid before any consul, or other commercial agent of the United States, whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance.

Fourth. All interlineations, erasures, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes and the provisions of law which guard the rights of mariners.

Fifth. Any consul of the United States, and in case there is none resident at a foreign port, or he is unable to discharge his duties, then any commercial agent of the United States authorized to perform such duties, may, upon the application of both the master and any mariner of the vessel under his command, discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages, under the provisions of the act of the twenty-eighth of February, eighteen hundred and three, or any other sum of money.

Sixth. Any consul, or other commercial agent, may also, on such joint application, discharge any mariner on such terms as will, in his judgment, save the United States from the liability to support such mariner, if the master gives his voluntary assent to such terms, and conforms thereto.

Seventh. When a mariner is so discharged, the officer discharging him shall make an official entry thereof upon the list of the crew and the shipping articles.

Eighth. Whenever any master shall ship a mariner in a foreign port, he shall forthwith take the list of his crew and the duplicate of the shipping articles to the consul, or person who discharges the duties of the office at that port, who shall make the proper entries thereon, setting forth the contract, and describing the person of the mariner; and thereupon the bond originally given for the return of the men shall embrace each person so shipped.

Ninth. When any mariner shall complain that the voyage is continued

contrary to his agreement, or that he has fulfilled his contract, the consul, or other commercial agent performing like duties, may examine into the same by an inspection of the articles of agreement; and if on the face of them he finds the complaint to be well founded, he shall discharge the mariner, if he desires it, and require of the master an advance, beyond the lawful claims of such mariner, of three months' wages, as provided in the act of February twenty-eighth, eighteen hundred and three; and in case the lawful claims of such mariner are not paid upon his discharge, the arrears shall from that time bear an interest of twenty per centum: *Provided, however*, If the consul or other commercial agent shall be satisfied the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, then he may, if he deems it just, discharge the mariner without exacting the three months' additional pay.

Tenth. All shipments of seamen, made contrary to the provisions of this and other acts of Congress, shall be void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.

Eleventh. It shall be the duty of consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner.

Twelfth. If the first officer, or any officer, and a majority of the crew of any vessel shall make complaint in writing that she is in an unsuitable condition to go to sea, because she is leaky, or insufficiently supplied with sails, rigging, anchors, or any other equipment, or that the crew is insufficient to man her, or that her provisions, stores, and supplies are not, or have not been, during the voyage, sufficient and wholesome, thereupon, in any of these or like cases, the consul or commercial agent who may discharge any duties of a consul shall appoint two disinterested, competent, practical men, acquainted with maritime affairs, to examine into the causes of complaint, who shall in their report state what defects and deficiencies, if any, they find to be well founded, as well as what, in their judgment, ought to be done to put the vessel in order for the continuance of her voyage.

Thirteenth. The inspectors so appointed shall have full power to examine the vessel and whatever is aboard of her, so far as is pertinent to their inquiry, and also to hear and receive any other proofs which the ends of justice may require, and if, upon a view of the whole proceedings, the consul, or other commercial agent shall be satisfied therewith, he may approve the whole or any part of the report, and shall certify

such approval, and if he dissents, shall also certify his reasons for so dissenting.

Fourteenth. The inspectors in their report shall also state whether, in their opinion, the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident, and in case it was by neglect or design, and the consul or other commercial agent approves of such finding, he shall discharge such of the crew as require it, each of whom shall be entitled to three months' pay in addition to his wages to the time of discharge; but, if in the opinion of the inspectors the defects or deficiencies found to exist have been the result of mistake or accident, and could not, in the exercise of ordinary care, have been known and provided against before the sailing of the vessel, and the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty; otherwise they shall, upon their request, be discharged, and receive each one month's wages in addition to the pay up to the time of discharge.

Fifteenth. The master shall pay all such reasonable charges in the premises as shall be officially certified to him under the hand of the consul or other commercial agent, but in case the inspectors report that the complaint is without any good and sufficient cause, the master may retain from the wages of the complainants, in proportion to the pay of each, the amount of such charges, with such reasonable damages for detention on that account as the consul or other commercial agent directing the inquiry may officially certify.

Sixteenth. The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith; stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon it shall be the duty of such consul or commercial agent to repair on board and inquire into the causes of the complaint, and to proceed thereon as this act directs.

Seventeenth. In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts; and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of the discharge, three months' pay; and the officer discharging him shall enter upon the crew-list and shipping articles the cause of discharge, and the

particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially.

Eighteenth. If any consul or commercial agent shall neglect or omit to perform, seasonably, the duties hereby imposed upon him, or shall be guilty of any malversation or abuse of power, he shall be liable to any injured person for all damage occasioned thereby; and for all malversation and corrupt conduct in office, he shall be liable to indictment, and, on conviction by any court of competent jurisdiction, shall be fined not less than one nor more than ten thousand dollars, and be imprisoned not less than one nor more than five years.

Nineteenth. If any master of a vessel shall proceed on a foreign voyage without the documents herein required, or refuse to produce them when required, or to perform the duties imposed by this act, or shall violate the provisions thereof, he shall be liable to each and every individual injured thereby, in damages, and shall, in addition thereto, be liable to pay a fine of one hundred dollars for each and every offence, to be recovered by any person suing therefor in any court of the United States in the district where such delinquent may reside or be found.

Twentieth. It shall be the duty of the boarding officer to report all violations of this act to the collector of the port where any vessel may arrive, and the collector shall report the same to the secretary of the treasury and to the attorney of the United States in his district.

Twenty-first. This act shall be in force from and after the first day of October next; and shall not apply to vessels which shall have sailed from ports of the United States before that time.

ACT OF 1842, CHAPTER CLXXXVIII. (5 U. S. Stats. at Large, 516).

An Act further supplementary to an Act, entitled "An Act to establish the Judicial Courts of the United States," passed the twenty-fourth of September, seventeen hundred and eighty-nine.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes, shall and may exercise all the powers that any justice of the peace, or other magistrate, of any of the United States may now exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the thirty-third section of the act

of the twenty-fourth of September, Anno Domini seventeen hundred and eighty-nine, entitled "An act to establish the judicial courts of the United States;" and who shall and may exercise all the powers that any judge or justice of the peace may exercise under and in virtue of the sixth section of the act passed the twentieth of July, Anno Domini seventeen hundred and ninety, entitled "An act for the government and regulation of seamen in the merchant service."

ACT OF 1842, CHAPTER CCLXVII. (5 U. S. Stats. at Large, 546).

An Act to establish and regulate the Navy Ration.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the navy ration shall consist of the following daily allowance of provisions for each person:

One pound of salted pork, with half a pint of peas or beans; or one pound of salted beef, with half a pound of flour, and a quarter of a pound of raisins, dried apples, or other dried fruits; or one pound of salt beef with half a pound of rice, two ounces of butter, and two ounces of cheese; together with fourteen ounces of biscuit, one quarter of an ounce of tea, or ounce of coffee, or one ounce of cocoa; two ounces of sugar, and one gill of spirits; and of a weekly allowance of half a pound of pickles or cranberries, half a pint of molasses, and half a pint of vinegar.

SEC. 2. *And be it further enacted*, That fresh meat may be substituted for salted beef or pork, and vegetables or sour-crout for the other articles usually issued with the salted meats, allowing one and a quarter pounds of fresh meat for one pound of salted beef or pork, and regulating the quantity of vegetables or sour-crout so as to equal the value of those articles for which they may be substituted.

SEC. 3. *And be it further enacted*, That, should it be necessary to vary the above-described daily allowance, it shall be lawful to substitute one pound of soft bread, or one pound of flour, or half a pound of rice, for fourteen ounces of biscuit; half a pint of wine for a gill of spirits; half a pound of rice for half a pint of beans or peas; half a pint of beans or peas for half a pound of rice. When it may be deemed expedient by the President of the United States, secretary of the navy, commander of a fleet or squadron, or of a single ship when not acting under the authority of another officer on foreign service, the articles of butter, cheese, raisins, dried apples, or other dried fruits, pickles, and molasses, may be substituted for each other and for spirits: *Provided*, The article substituted shall not exceed in value the article for which it may be

issued, according to the scale of prices which is or may be established for the same.

SEC. 4. *And be it further enacted*, That in cases of necessity, the daily allowance of provisions may be diminished or varied by the discretion of the senior officer present in command, but payment shall be made to the persons whose allowance shall be thus diminished, according to the scale of prices which is or may be established for the same: but a commander who shall thus make a diminution or variation shall report to his commanding officer or to the navy department, the necessity for the same, and give to the purser written orders specifying particularly the diminution or reduction which is to be made.

SEC. 5. *And be it further enacted*, That no commissioned officer or midshipman, or any person under twenty-one years of age, shall be allowed to draw the spirit part of the daily ration, and all other persons shall be permitted to relinquish that part of their ration, under such restrictions as the President of the United States may authorize: and to every person who, by this section, is prohibited from drawing, or who may relinquish, the spirit part of his ration, there shall be paid in lieu thereof, the value of the same in money, according to the prices which are or may be established for the same.

SEC. 6. *And be it further enacted*, That the provisions of this act shall go into effect in the United States, on the first day of the succeeding quarter after it becomes a law, and in vessels abroad, on the first day of the succeeding quarter after its official receipt: and any acts and parts of acts which may be contrary to, or inconsistent with, the provisions of this act, shall be and are hereby repealed.

ACT OF 1843, CHAPTER XLIX. (5 U. S. Stats. at Large, 602).

An Act amendatory of "An Act for the Relief of Sick and Disabled Seamen."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and penalties of the act of the sixteenth of July, one thousand seven hundred and ninety-eight, entitled "An act for the relief of sick and disabled seamen," be, and the same hereby are, extended to the masters, owners, and seamen of registered vessels employed in carrying on the coasting trade; and the secretary of the treasury is authorized and directed to issue such instructions to the collectors of the various ports as shall secure the collection of hospital money from said seamen, masters, and owners.

ACT OF 1843, CHAPTER XCIV. (5 U. S. Stats. at Large, 626).

An Act to modify the Act entitled "An Act to provide for the better security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam," approved July seventh, eighteen hundred and thirty-eight.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every boat or vessel which existing laws require to be registered, and which is propelled in whole or in part by steam, shall be provided with such additional apparatus or means as, in the opinion of the inspector of steamboats, shall be requisite to steer the boat or vessel, to be located in such part of the boat or vessel as the inspector may deem best to enable the officers and crew to steer and control the boat or vessel, in case the pilot or man at the wheel is driven from the same by fire; and no boat or vessel, exclusively propelled by steam, shall be registered, after the passage of this act, unless the owner, master, or other proper person, shall file with the collector, or other proper officer, the certificate of the inspector, stating that suitable means have been provided to steer the boat or vessel, in case the pilot or man at the wheel is driven therefrom by fire.

SEC. 2. *And be it further enacted*, That it shall be lawful in all vessels or boats propelled in whole or in part by steam, and which shall be provided with additional apparatus or means to steer the same, as required by the first section of this act, to use wheel or tiller ropes, composed of hemp or other good and sufficient material around the barrel or axle of the wheel, and to a distance not exceeding twenty-two feet therefrom, and also in connecting the tiller or rudder yoke with iron rods or chains used for working the rudder: *Provided*, That no more rope for this purpose shall be used than is sufficient to extend from the connecting points of the tiller or rudder yoke placed in any working position beyond the nearest blocks or rollers, and give sufficient play to work the ropes on such blocks or rollers: *And provided, further*, That there shall be chains extending the whole distance of the ropes, so connected with the tiller or rudder yoke, and attached or fastened to the tiller or rudder yoke, and the iron chains or rods extending towards the wheel, in such manner as will take immediate effect, and work the rudder in case the ropes are burnt or otherwise rendered useless.

SEC. 3. *And be it further enacted*, That the master and owner, and all others interested in vessels navigating Lakes Champlain, Ontario, Erie, Huron, Superior, and Michigan, or any of them, and which are propelled by sails and Erickson's propeller, and used exclusively in car

rying freight, shall from and after the passage of this act, be exempt from liability or fine for failing to provide, as a part of the necessary furniture of such vessel, a suction hose and fire engine and hose suitable to be worked on such vessel in case of fire, or more than one long boat or yawl.

SEC. 4. *And be it further enacted*, That it shall be lawful for the court before which any suit, information, or indictment is or shall be pending for the violation, before the passage of this act, of so much of the ninth section of the act aforesaid as requires "that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel and tiller ropes," to order such suit, information, or indictment to be discontinued, on such terms as to costs as the court shall judge to be just and reasonable: *Provided*, That the defendant or defendants in such prosecution shall cause it to appear, by affidavit or otherwise, to the satisfaction of the court, that he or they had failed to use iron rods or chains in the navigation of his or their boat or boats, from a well-grounded apprehension that such rods or chains could not be employed for the purpose aforesaid with safety.

SEC. 5. *And be it further enacted*, That in execution of the authority vested in him by the second section of the joint resolution "authorizing experiments to be made for the purpose of testing Samuel Colt's submarine battery and for other purposes," approved August thirty-first, one thousand eight hundred and forty-two, the secretary of the navy shall appoint a board of examiners, consisting of three persons, of thorough knowledge as to the structure and use of the steam-engine, whose duty it shall be to make experimental trials of such inventions and plans designed to prevent the explosion of steam boilers and collapsing of flues as they may deem worthy of examination, and report the result of their experiments, with an expression of their opinion as to the relative merits and efficacy of such inventions and plans, which report the secretary shall cause to be laid before congress, at its next session. It shall also be the duty of said examiners to examine and report the relative strength of copper and iron boilers of equal thickness, and what amount of steam to the square inch each, when sound, is capable of working with safety; and whether hydrostatic pressure, or what other plan is best for testing the strength of boilers under the inspection laws; and what limitations as to the force or pressure of steam to the square inch, in proportion to the ascertained capacity of a boiler to resist, it would be proper to establish by law for the more certain prevention of explosions.

SEC. 6. *And be it further enacted*, That so much of the act aforesaid as is inconsistent with the provisions of this act shall be, and the same is hereby, repealed.

ACT OF 1845, CHAPTER XVII. (5 U. S. Stats. at Large, 725).

An Act to amend the Act entitled "An Act to provide for the Enlistment of Boys for the Naval Service, and to Extend the Term of Enlistment of Seamen."

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, from and after the passage of this act, the provisions of the second and third sections of the act entitled "An act to provide for the enlistment of boys for the naval service, and to extend the term of the enlistment of seamen," approved March second, one thousand eight hundred and thirty-seven, which authorize and provide for the detention of any person enlisted for the navy, after the expiration of the enlistment, until the return of such person to the United States, shall be understood and construed to authorize and provide for the detention of such person until the arrival of the vessel in which he shall be so detained at a port of the United States, and until he shall have received his regular discharge by order of the secretary of the navy: *Provided*, That such detention shall not exceed the term of thirty days from the time of the arrival of the said vessel in a port of the United States.

SEC. 2. *And be it further enacted*, That the commanding officer of any vessel, squadron, or fleet of the navy of the United States, when upon the high seas, or in any foreign port where there is no resident consul of the United States, shall be and is hereby authorized and empowered to exercise all the powers of a consul in relation to mariners of the United States.

ACT OF 1848, CHAPTER XLVIII. (9 U. S. Stats. at Large, 232).

An Act extending Privileges to American Vessels engaged in a certain mentioned Trade, and for other Purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall hereafter be lawful for any steamship or other vessel, on being duly registered in pursuance of the laws of the United States, to engage in trade between one port in the United States and one or more ports within the same, with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers, and their baggage, and letters, and mails: *Provided*, That all such vessels shall be furnished by the collectors of the ports at which they shall take in their cargoes in the United States, with certified manifests, setting forth the particulars of

the cargoes, the marks, number of packages, by whom shipped, to whom consigned, at what port to be delivered; designating such goods as are entitled to drawback, or to the privilege of being placed in warehouse; and the masters of all such vessels shall, on their arrival at any port of the United States from any foreign port at which such vessel may have touched, as herein provided, conform to the laws providing for the delivery of manifests, of cargo, and passengers taken on board at such foreign port, and all other laws regulating the report and entry of vessels from foreign ports, and be subject to all the penalties therein prescribed.

SEC. 2. *And be it further enacted*, That all vessels, and their cargoes, engaged in the trade referred to in this act, shall become subject to the provisions of existing collection and revenue laws on arrival in any port in the United States: *Provided*, That any foreign goods, wares, or merchandise, taken in at one port of the United States, to be conveyed in said vessels to any other port within the same, either under the provisions of the warehousing act of sixth August, eighteen hundred and forty-six, or under the laws regulating the transportation coastwise of goods entitled to drawback, as well as any goods, wares, or merchandise not entitled to drawback, but on which the import duties chargeable by law shall have been duly paid, shall not become subject to any import duty by reason of the vessel in which they may arrive having touched at a foreign port during the voyage, in pursuance of the privilege given in this act.

ACT OF 1848, CHAPTER CXLI. (9 U. S. Stats. at Large, 274).

An Act to authorize the Secretary of the Treasury to license Yachts, and for other Purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the secretary of the treasury is hereby authorized to cause yachts used and employed exclusively as pleasure vessels, and designed as models of naval architecture, and now entitled to be enrolled as American vessels, to be licensed on terms which will authorize them to proceed from port to port of the United States without entering or clearing at the custom-house. Such license shall be in such form as the secretary of the treasury may prescribe: *Provided*, Such vessels so enrolled and licensed shall not be allowed to transport merchandise or carry passengers for pay: *And provided further*, That the owner of any such vessel, before taking out such license, shall give a bond, in such form and for such amount as the secretary of the treasury shall prescribe, conditional that the said vessel shall not engage in any unlawful trade, nor in any way violate the revenue

laws of the United States, and shall comply with the laws in all other respects.

SEC. 2. *And be it further enacted*, That all such vessels shall, in all respects, except as above, be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this act.

SEC. 3. *And be it further enacted*, That all such licensed yachts shall use a signal of the form, size, and colors prescribed by the secretary of the navy, and the owners thereof shall at all times permit the naval architects in the employ of the United States to examine and copy the models of said yachts.

ACT OF 1849, CHAPTER CV. (9 U. S. Stats. at Large, 382).

Regulations to be observed by Vessels, Steamboats, &c., navigating the Northern or Northwestern Lakes.

SEC. 5. *And be it further enacted*, That vessels, steamboats, and propellers, navigating the northern and western lakes, shall, from and after the thirtieth day of April next, comply with the following regulations, for the security of life and property, to wit: during the night, vessels on the starboard tack shall show a red light, vessels on the larboard tack a green light, and vessels going off large, or before the wind, or at anchor, a white light; steamboats and propellers shall carry on the stem, or as far forward as possible, a triangular light, at an angle of about sixty degrees with the horizon, and on the starboard side a light shaded green, and on the larboard side red; said lights shall be furnished with reflectors, &c., complete, and of a size to insure a good and sufficient light; and if loss or damage shall occur, the owner or owners of the vessel, steamboat, or propeller, neglecting to comply with these regulations, shall be liable to the injured party for all loss or damage resulting from such neglect; and the owner or owners of any vessel failing to comply with said regulations shall forfeit a penalty of one hundred dollars, which may be recovered in an action of debt, to be brought by the district attorney of the United States, in the name of the United States, in any court of competent jurisdiction.

ACT OF 1850, CHAPTER XXVII. (9 U. S. Stats. at Large, 440).

An Act to provide for recording the Conveyances of Vessels, and for other Purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no bill

of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled: *Provided*, That the lien by bottomry on any vessel created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act.

SEC. 2. *And be it further enacted*, That the collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and, also, all certificates for discharging and cancelling any such conveyances, in a book or books to be kept for that purpose, in the order of their reception: noting in said book or books, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received, and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance, or certificate of discharge, fifty cents.

SEC. 3. *And be it further enacted*, That the collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee, and shall permit said index and books of records to be inspected during office hours, under such reasonable regulations as they may establish, and shall, when required, furnish to any person a certificate, setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each (if inserted in the register or enrolment), and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel, recorded since the issuing of the last register or enrolment, viz., the date, amount of such incumbrance, and from and to whom or in whose favor made; the collector shall receive for each such certificate one dollar.

SEC. 4. *And be it further enacted*, That the collectors of the customs shall furnish certified copies of such records on the receipt of fifty cents for each bill of sale, mortgage, or other conveyance.

SEC. 5. *And be it further enacted*, That the owner, or agent of the owner of any vessel of the United States, applying to a collector of the customs for a register or enrolment of a vessel, shall, in addition to the oath now prescribed by law, set forth, in the oath of ownership, the part or proportion of such vessel belonging to each owner, and the same shall be inserted in the register or enrolment; and that all bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned

by each person selling, and the part conveyed to each person purchasing.

SEC. 6. *And be it further enacted*, That the twelfth clause or section of the act entitled "An act in addition to the several acts regulating the shipment and discharge of seamen, and the duties of consuls," approved July twentieth, eighteen hundred and forty, be so amended, as that all complaints in writing to the consuls or commercial agents as therein provided, that a vessel is unseaworthy, shall be signed by the first, or the second and third officers, and a majority of the crew, before the consul or commercial agent shall be authorized to notice such complaint, or proceed to appoint inspectors as therein provided.

SEC. 7. *And be it further enacted*, That any person, not being an owner, who shall, on the high seas, wilfully, with intent to burn or destroy, set fire to any ship or other vessel, or otherwise attempt the destruction of such ship or other vessel, being the property of any citizen or citizens of the United States, or procure the same to be done, with the intent aforesaid, and being thereof lawfully convicted, shall suffer imprisonment to hard labor, for a term not exceeding ten years, nor less than three years, according to the aggravation of the offence.

SEC. 8. *And be it further enacted*, That this act shall be in force from and after the first day of October next ensuing.

ACT OF 1850, CHAPTER LXXX. (9 U. S. Stats. at Large, 514).

An Act making Appropriations for the Naval Service for the year ending the thirtieth of June, one thousand eight hundred and fifty-one, and abolishing flogging in the Navy and on board Vessels of Commerce.

For transportation of the United States mail between New York and Liverpool, between New York and New Orleans, Havana and Chagres, and between Panama and some points in the Territory of Oregon, eight hundred and seventy-four thousand six hundred dollars: *Provided*, That no payment shall be made for said services, except in proportion to the mail service heretofore performed, or that may be hereafter performed; and that the secretary of the navy is hereby directed to make payment in said proportion only: *Provided*, That flogging in the navy, and on board vessels of commerce, be, and the same is hereby, abolished from and after the passage of this act.

ACT OF 1851, CHAPTER XLIII. (9 U. S. Stats. at Large, 635).

An Act to limit the Liability of Ship-Owners, and for other Purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: *Provided*, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

SEC. 2. *And be it further enacted*, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

SEC. 3. *And be it further enacted*, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

SEC. 4. *And be it further enacted*, That if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said

freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.

SEC. 5. *And be it further enacted*, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual, and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

SEC. 6. *And be it further enacted*, That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss, or destruction of goods, wares, merchandise, or other property, put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or mariners, respectively, nor shall any thing herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

SEC. 7. *And be it further enacted*, That any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.

This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation.

ACT OF 1852, CHAPTER CVI. (10 U. S. Stats. at Large, 61).

An Act to amend an Act entitled "An Act to provide for the better security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam," and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no license, register, or enrolment, under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector, to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which this is an amendment.

SEC. 2. *And be it further enacted*, That it shall be the duty of the inspectors of the hulls of steamers, and the inspectors of boilers and engines, appointed under the provisions of this act, to examine and see that suitable and safe provisions are made throughout such vessel to guard against loss or danger from fire; and no license or other papers, on any application, shall be granted, if the provisions of this act for preventing fires are not complied with, or if any combustible material liable to take fire from heated iron, or any other heat generated on board of such vessels in and about the boilers, pipes, or machinery, shall be placed at less than eighteen inches distant from such heated metal or other substance likely to cause ignition, unless a column of air or water intervenes between such heated surface and any wood or other combustible material so exposed, sufficient at all times, and under all circumstances, to prevent ignition; and further, when wood is so exposed to ignition, as an additional preventive, it shall be shielded by some incombustible material in such manner as to leave the air to circulate freely between such material and the wood. *Provided, however*, That when the structure of such steamers is such, or the arrangement of the boilers or machinery is such that the requirements aforesaid cannot, without serious inconvenience or sacrifice, be complied with, inspectors may vary therefrom, if in their judgment it can be done with safety.

SEC. 3. *And be it further enacted*, That every vessel so propelled by steam, and carrying passengers, shall have not less than three double-acting forcing pumps, with chamber at least four inches in diameter, two to be worked by hand and one by steam, if steam can be employed, otherwise by hand; one whereof shall be placed near the stern, one near

the stem, and one amidship; each having a suitable, well-fitted hose, of at least two thirds the length of the vessel, kept at all times in perfect order and ready for immediate use; each of which pumps shall also be supplied with water by a pipe connected therewith, and passing through the side of the vessel, so low as to be at all times in the water when she is afloat: *Provided*, That, in steamers not exceeding two hundred tons measurement, two of said pumps may be dispensed with; and in steamers of over two hundred tons, and not exceeding five hundred tons measurement, one of said pumps may be dispensed with.

Sec. 4. *And be it further enacted*, That every such vessel, carrying passengers, shall have at least two good and suitable boats, supplied with oars, in good condition at all times for service, one of which boats shall be a life-boat made of metal, fire-proof, and in all respects a good, substantial, safe sea boat, capable of sustaining, inside and outside, fifty persons, with life-lines attached to the gunwale, at suitable distances. And every such vessel of more than five hundred tons, and not exceeding eight hundred tons measurement, shall have three life-boats; and every such vessel of more than eight hundred tons, and not exceeding fifteen hundred tons measurement, shall have four life-boats; and every such vessel of more than fifteen hundred tons measurement, shall have six life-boats — all of which boats shall be well furnished with oars and other necessary apparatus: *Provided, however*, The inspectors are hereby authorized to exempt steamers navigating rivers only, from the obligation to carry, of the life-boats herein provided for, more than one, the same being of suitable dimensions, made of metal and furnished with all necessary apparatus for use and safety — such steamers having other suitable provisions for the preservation of life in case of fire or other disaster.

Sec. 5. *And be it further enacted*, That every such vessel, carrying passengers, shall also be provided with a good life-preserver, made of suitable material, or float well adapted to the purpose, for each and every passenger, which life-preservers and floats shall always be kept in convenient and accessible places in such vessel, and in readiness for the use of the passengers; and every such vessel shall also keep twenty fire buckets and five axes; and there shall be kept on board every such vessel exceeding five hundred tons measurement, buckets and axes after the rate of their tonnage, as follows: on every vessel of six hundred tons measurement, five buckets and one axe for each one hundred tons measurement, decreasing this proportion as the tonnage of the vessel increases, so that any such vessel of thirty-five hundred tons, and all such vessels exceeding the same shall not be required to keep but three buckets for each one hundred tons of measurement, and but one axe for every five buckets.

SEC. 6. *And be it further enacted*, That every such vessel carrying passengers on the main or lower deck, shall be provided with sufficient means convenient to such passengers for their escape to the upper deck in case of fire or other accident endangering life.

SEC. 7. *And be it further enacted*, That no loose hemp shall be carried on board any such vessel; nor shall baled hemp be carried on the deck or guards thereof, unless the bales are compactly pressed and well covered with bagging, or a similar fabric; nor shall gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids or materials which ignite by friction, be carried on board any such vessel, as freight, except in cases of special license for that purpose, as hereinafter provided; and all such articles kept on board as stores, shall be secured in metallic vessels: and every person who shall knowingly violate any of the provisions of this section, shall pay a penalty of one hundred dollars for each offence, to be recovered by action of debt in any court of competent jurisdiction.

SEC. 8. *And be it further enacted*, That hereafter all gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, and materials which ignite by friction, when packed or put up for shipment on board of any such vessel, shall be securely packed or put up separately from each other and from all other articles, and the package, box, cask, or vessel containing the same, shall be distinctly marked on the outside with the name or description of the articles contained therein; and every person who shall pack or put up, or cause to be packed or put up for shipment on board of any such vessel, any gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, or materials which ignite by friction, otherwise than as aforesaid, or shall ship the same, unless packed and marked as aforesaid, on board of any steam-vessel carrying passengers, shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding eighteen months, or both.

SEC. 9. *And be it further enacted*, That instead of the existing provisions of law for the inspection of steamers and their equipment, and instead of the present system of pilotage of such vessels, and the present mode of employing engineers on board the same, the following regulations shall be observed, to wit: The collector or other chief officer of the customs, together with the supervising inspector for the district, and the judge of the district court of the United States for the district in each of the following collection districts, namely, New Orleans and St. Louis, on the Mississippi River; Louisville, Cincinnati, Wheeling, and Pittsburg, on the Ohio River; Buffalo and Cleaveland, on Lake Erie; Detroit, upon Detroit River; Nashville, upon the Cumberland River; Chicago, on Lake Michigan; Oswego, on Lake Ontario; Burlington, in Vermont;

Galveston, in Texas; Mobile, in Alabama; Savannah, in Georgia; Charleston, in South Carolina; Norfolk, in Virginia; Baltimore, in Maryland; Philadelphia, in Pennsylvania; New York, in New York; New London, in Connecticut; Boston, in Massachusetts; Portland, in Maine; and San Francisco, in California — shall designate two inspectors, of good character and suitable qualifications to perform the services required of them by this act within the respective districts for which they shall be appointed, one of whom, from his practical knowledge of ship-building, and the uses of steam in navigation, shall be fully competent to make a reliable estimate of the strength, seaworthiness, and other qualities of the hulls of steamers and their equipment, deemed essential to safety of life, when such vessels are employed in the carriage of passengers, to be called the Inspector of Hulls; the other of whom, from his knowledge and experience of the duties of an engineer employed in navigating vessels by steam, and also in the construction and use of boilers, and the machinery and appurtenances therewith connected, shall be able to form a reliable opinion of the quality of the material, the strength, form, workmanship, and suitableness of such boilers and machinery to be employed in the carriage of passengers, without hazard to life, from imperfections in the material, workmanship, or arrangement of any part of such apparatus for steaming, to be called the Inspector of Boilers; and these two persons thus designated, if approved by the secretary of the treasury, shall be, from the time of such designation, inspectors, empowered and required to perform the duties herein specified, to wit:

First. Upon application in writing by the master or owner, they shall, once in every year at least, carefully inspect the hull of each steamer belonging to their respective districts and employed in the carriage of passengers, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for her crew and passengers, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life-preservers, floats, and other things, are faithfully complied with; and if they deem it expedient, they may direct the vessel to be put in motion, and may adopt any other suitable means to test her sufficiency and that of her equipment.

Second. They shall also inspect the boilers of such steamers before the same shall be used, and once in every year thereafter, subjecting them to a hydrostatic pressure, the limit to which, not exceeding one hundred and sixty-five pounds to the square inch for high pressure boilers, may be prescribed by the owner or the master, and shall satisfy

themselves by examination and experimental trials, that the boilers are well made of good and suitable material; that the openings for the passage of water and steam respectively, and all pipes and tubes exposed to heat are of proper dimensions, and free from obstruction; that the spaces between the flues are sufficient, and that the fire line of the furnace is below the prescribed water-line of the boilers; and that such boilers and the machinery and the appurtenances may be safely employed in the service proposed in the written application, without peril to life; and shall also satisfy themselves that the safety-valves are of suitable dimensions, sufficient in number, well arranged, and in good working order, (one of which may, if necessary in the opinion of the inspectors, to secure safety, be taken wholly from the control of all persons engaged in navigating such vessel;) that there is a suitable number of gauge-cocks properly inserted, and a suitable water-gauge and steam-gauge indicating the height of the water and the pressure of the steam; that in or upon the outside flue of each outside high-pressure boiler, there is placed in a suitable manner alloyed metals, fusible by the heat of the boiler when raised to the highest working pressure allowed, and that in or upon the top of the flues of all other high-pressure boilers in the steamer, such alloyed metals are placed, as aforesaid, fusing at ten pounds greater pressure than said metals on the outside boilers, thereby, in each case, letting steam escape; and that adequate and certain provision is made for an ample supply of water to feed the boilers at all times, whether such vessel is in motion or not; so that, in high-pressure boilers, the water shall not be less than four inches above the flue: *Provided, however*, in steamers hereafter supplied with new high-pressure boilers, if the alloy fuses on the outer boilers at a pressure of ten pounds exceeding the working pressure allowed, and at twenty pounds above said pressure on the inner boilers, it shall be a sufficient compliance with this act.

Third. That in subjecting to the hydrostatic test aforesaid, boilers called and usually known under the designation of high-pressure boilers, the inspectors shall assume one hundred and ten pounds to the square inch as the maximum pressure allowable as a working power for a new boiler forty-two inches in diameter, made of inspected iron plates at least one fourth of an inch thick, in the best manner, and of the quality herein required, and shall rate the working power of all high-pressure boilers, whether of greater or less diameter, old or new, according to their strength compared with this standard: and in all cases the test applied shall exceed the working power allowed, in the ratio of one hundred and sixty-five to one hundred and ten, and no high-pressure boilers hereafter made shall be rated above this standard: and in subjecting to the test aforesaid, that class of boilers usually designated and known as low-pres-

sure boilers, the said inspectors shall allow as a working power of each new boiler a pressure of only three fourths the number of pounds to the square inch to which it shall have been subjected by the hydrostatic test and found to be sufficient therefor, using the water in such tests at a temperature not exceeding sixty degree Fahrenheit; but should such inspectors be of the opinion, that said boiler by reason of its construction or material will not safely allow so high a working pressure, they may, for reasons to be stated specifically in their certificate, fix the working pressure of said boiler at less than three fourths of said test pressure, and no low-pressure boiler hereafter made shall be rated in its working pressure above the aforesaid standard: and provided that the same rules shall be observed in regard to boilers heretofore made, unless the proportion between such boilers and the cylinders or some other cause renders it manifest that its application would be unjust, in which cases the inspectors may depart from these rules, if it can be done with safety; but in no case shall the working pressure allowed exceed the hydrostatic test, and no valve under any circumstances shall be loaded or so managed in any way as to subject a boiler to a greater pressure than the amount allowed by the inspectors, nor shall any boiler or pipe be approved which is made in whole or in part of bad material, or is unsafe in its form, or dangerous from defective workmanship, age, use, or any other cause.

Fourth. That when the inspection in detail is completed, and the inspectors approve of the vessel and her equipment throughout, they shall make and subscribe a certificate to the collector of the district, substantially as follows: —

State of District of Application having been made in writing by to the subscribers, inspectors for said district, to examine the steamer of whereof are owners, and is master, we having performed that service, now, on this day of A. D. do certify, that she was built in the year , is in all respects staunch, sea-worthy, and in good condition for navigation, having suitable means of escape in case of accident from the main to the upper deck, that she is provided with (here insert the number of state-rooms, the number of berths therein, the number of other permanent berths for cabin passengers, the number of berths for deck or other classes of passengers, the number of passengers of each class for whom she has suitable accommodations, and in case of steamers sailing to or from any European port, or to or from any port on the Atlantic or the Pacific, a distance of one thousand miles or upwards, the number of each she is permitted to carry, — and in case of a steamer sailing to any other port, a distance of five hundred miles or upwards, the number of deck passengers she is permitted to carry, also the number of boilers, and the

form, dimensions, and material of which each boiler is made, the thickness of the metal, and when made — if made after this act takes effect, and of iron, whether they are such in all respects as the act requires, whether each boiler has been tried by hydrostatic test, the amount of pressure to the square inch in pounds applied to it, whether the amount allowed as the maximum working power was determined by the rule prescribed by this act, if not, the reason for a departure from it; also the number of safety-valves required, their capacity, the load prescribed for each valve, how many are left to the control of the persons navigating the vessel, whether one is withdrawn, and the manner of securing it against interference, also the number and dimensions of supply pipes, and whether they and the other means provided are sufficient at all times and under all circumstances, when in good order, to keep the water up four inches at least above the top of the flue; also the number and dimensions of the steam-pipes, the number and kind of engines, the dimensions of their cylinders, the number and capacity of the forcing-pumps, and how worked, the number and kind of gauge-cocks, water and steam gauges, where situate, and how secured; also the manner of using alloyed metals, and the pressure at which they are known by the inspectors to fuse; the equipments for the extinguishment of fires, including hose, fire-buckets, and axes; the provisions for saving life in case of accident, including boats, life-preservers, and substitutes therefor, where kept, and all other provisions made on board for the security of the lives of passengers). And we further certify, that the equipment of the vessel throughout, including pipes, pumps, and other means to keep the water up to the point aforesaid, hose, boats, life-preservers, and other things, is in conformity with the provisions of law; and that we declare it to be our deliberate conviction, founded upon the inspection which we have made, that the vessel may be employed as a steamer upon the waters named in the application, without peril to life, from any imperfection of form, materials, workmanship, or arrangement of the several parts, or from age or use. And we further certify, that said vessel is to run within the following limits, to wit: from to and back, touching at intermediate places.

And which certificate shall be verified by the oaths of the inspectors signing it, before a person competent by law to administer oaths. And in case the said inspectors do not grant a certificate of approval, they shall state, in writing, and sign the same, their reasons for their disapproval.

Fifth. Upon the application of the master or owner of any steamer employed in the carriage of passengers, for a license to carry gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, and materials which ignite by friction, or either of them, the

inspectors shall examine such vessel, and if they find that she is provided with chests or safes composed of metal, or entirely lined therewith, or one or more apartments thoroughly lined with metal at a secure distance from any fire, they may grant a certificate to that effect, authorizing such vessel to carry as freight any of the articles aforesaid, those of each description to be secured in such chest, safe, or apartment, containing no other article, and carried at a distance from any fire to be specified in the certificate: *Provided*, That any such certificate may be revoked or annulled at any time by the inspectors, upon proof that either of the said articles have been carried on board said vessel, at a place or in a manner not authorized by such certificate, or that any of the provisions of this act in relation thereto have been violated.

Sixth. The said inspectors shall keep a regular record of certificates of inspections of vessels, their boilers, engines, and machinery, whether of approval or disapproval, and when recorded, the original shall be delivered to the collector of the district; they shall keep a like record of certificates, authorizing gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids and materials which ignite by friction, or either of them, to be carried as freight, by any such vessel; and when recorded deliver the originals to said collector; they shall keep a like record of all licenses to pilots and engineers, and all revocations thereof, and shall from time to time report to the supervising inspector of their respective districts, in writing, their decisions on all applications for such licenses, or proceedings for the revocation thereof, and all testimony received by them in such proceedings.

Seventh. The inspectors shall license and classify all engineers and pilots of steamers carrying passengers.

Eighth. Whenever any person claiming to be qualified to perform the duty of engineer upon steamers carrying passengers, shall apply for a certificate, the board of inspectors shall examine the applicant, and the proofs which he produces in support of his claim; and if, upon full consideration, they are satisfied that his character, habits of life, knowledge, and experience in the duties of an engineer, are all such as to authorize the belief that the applicant is a suitable and safe person to be intrusted with the powers and duties of such a station, they shall give him a certificate to that effect, for one year, signed by them, in which certificate they shall state the time of the examination, and shall assign the appointee to the appropriate class of engineers.

Ninth. Whenever any person claiming to be a skilful pilot for any such vessel shall offer himself for a license, the said board shall make diligent inquiry as to his character and merits; and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him for one year to be a

pilot of any such vessels within the limit prescribed in the certificate; but the license of any such engineer or pilot may be revoked upon proof of negligence, unskilfulness, or inattention to the duties of the station: *Provided, however*, If in cases of refusal to license engineers or pilots, and in cases of the revocation of any license by the local board of inspectors, any engineer or pilot deeming himself wronged by such refusal or revocation, may, within thirty days after notice thereof, on application to a supervising inspector, have his case examined anew by such supervising inspector, upon producing a certified copy of the reasons assigned by the local board for their doings in the premises; and such supervising inspector may revoke the decision of such local board of inspectors and license such pilot or engineer; and like proceedings, upon the same conditions may be had by the master or owner of any such vessel, or of any steamboat-boiler, for which the said local board shall have refused, upon inspection, to give a certificate of approval, or shall have notified such master or owner of any repairs necessary after such certificate has been granted.

Tenth. It shall be unlawful for any person to employ, or any person to serve as engineer or pilot, on any such vessel, who is not licensed by the inspectors; and any one so offending shall forfeit one hundred dollars for each offence: *Provided, however*, That if a vessel leaves her port with a complement of engineers and pilots, and on her voyage is deprived of their services, or the services of any of them, without the consent, fault, or collusion of the master, owner, or any one interested in the vessel, the deficiency may be temporarily supplied, until others, licensed, can be obtained.

Eleventh. In addition to the annual inspection, it shall be the duty of said board to examine, seasonably, steamers arriving and departing, so often as to enable them to detect any neglect to comply with the requirements of law, and also any defects or imperfections becoming apparent after the inspection aforesaid, and tending to render the navigation of the vessel unsafe, which service may be performed by one of the board; and if he shall discover an omission to comply with the law or that repairs have become necessary to make the vessel safe, he shall at once notify the master, stating in the notice what is required; and if the master deems the requirements unreasonable or unnecessary, he may take the opinion of the board thereon, and if dissatisfied with the decision of such board may apply for a reëxamination of the case to the supervising inspector as is hereinbefore provided; and if he shall refuse or neglect to comply with the requirements of the local board, and shall, contrary thereto, and while the same remains unreversed by the supervising inspector, employ the vessel by navigating her, the master and owner shall be liable for any damage to the passengers and their baggage which

shall occur from any defects so as aforesaid stated in said notice, which shall be in writing, and all inspections and orders shall be promptly made by the inspectors; and where it can be safely done in their judgment, they shall permit repairs to be made where those interested can most conveniently do them; and no inspectors of one district shall modify or annul the doings of the inspectors of another district, in regard to repairs, unless there is a change in the state of things demanding more repairs than were thought necessary when the order was made; nor shall the inspectors of one district appoint a person coming from another, if such person had been rejected for unfitness or want of qualifications.

Twelfth. The said board, when thereto requested, shall inspect steamers belonging to districts where no such board is established; and if a certificate of approval is not granted, no other inspection shall be made by the same or any other board, until the objections made by the inspectors are removed; and if any vessel shall be navigated after a board of inspectors have refused to make the collector a certificate of approval, she shall be liable to the same penalties as if she had been run without a license: *Provided, however*, That nothing herein contained shall impair the right of the inspectors to permit such vessel to go to another port for repairs, if, in their opinion, it is safe so to do.

Thirteenth. The said board of inspectors shall have power to summon before them witnesses, and to compel their attendance by the same process as in courts of law; and after reasonable time given to the alleged delinquent, at the time and place of investigation, to examine said witnesses under oath, touching the performance of their duties by engineers and pilots of any such vessel; and if it shall appear satisfactorily that any such engineer or pilot is incompetent; or that life has been placed in peril by reason of such incompetency, or by negligence or misconduct on the part of any such person, the board shall immediately suspend or revoke his license, and report their doings to the chief officer of the customs; and the said chief officer of the customs shall pay out of the revenues herein provided such sums to any witness so summoned under the provisions of this act, for his actual travel and attendance, as shall be officially certified, by an inspector hearing the case, upon the back of the summons, not exceeding the rates allowed to a witness for travel and attendance in the circuit and district courts of the United States.

Fourteenth. That the said board shall report promptly all their doings to the chief officer of the customs, as well as all omissions or refusals to comply with the provisions of law on the part of any owner or master of any such vessel, propelled in whole or in part by steam, carrying passengers.

Fifteenth. That it shall at all times be the duty of all engineers and pilots licensed under this act, and all mates, to assist the inspectors in the examination of any such vessels to which any such engineer, mate, or pilot belongs, and to point out all defects and imperfections in the hull or apparatus for steaming, and also to make known to them at the earliest opportunity, all accidents occasioning serious injury to the vessel or her equipment, whereby life may be in danger, and in default thereof the license of any such engineer or pilot shall be revoked.

SEC. 10. *And be it further enacted*, That in those cases where the number of passengers is limited by the inspector's certificate, it shall not be lawful to take on board of any steamer a greater number of passengers than is certified by the inspectors in the certificate; and the master and owners, or either of them, shall be liable, to any person suing for the same, to forfeit the amount of passage money and ten dollars for each passenger beyond the number allowed. And moreover, in all cases of an express or implied undertaking to transport passengers, or to supply them with food and lodging, from place to place, and suitable provision is not made of a full and adequate supply of good and wholesome food and water, and of suitable lodging for all such passengers, or where barges, or other craft, impeding the progress, are taken in tow, for a distance exceeding five hundred miles, without previous and seasonable notice to such passengers, in all such cases the owners and the vessel shall be liable to refund all the money paid for the passage, and to pay also the damage sustained by such default or delay: *Provided, however*, That if in any such case a satisfactory bond is given to the marshal for the benefit of the plaintiff, to secure the satisfaction of such judgment as he may recover, the vessel shall be released.

SEC. 11. *And be it further enacted*, That if the master of a steamer, or any other person, whether acting under orders or not, shall intentionally load or obstruct, or cause to be loaded or obstructed, in any way or manner, the safety valve or valves of a boiler, or shall employ any other means or device whereby the boiler shall be subjected to a greater pressure than the amount allowed by the certificate of the inspectors, or shall be exposed to a greater pressure, or shall intentionally derange or hinder the operation of any machinery or device employed to denote the state of the water or steam in any boiler, or to give warning of approaching danger, it shall, in any such case, be a misdemeanor, and any and every person concerned therein, directly or indirectly, shall forfeit two hundred dollars, and may, at the discretion of the court, be in addition thereto imprisoned not exceeding eighteen months.

SEC. 12. *And be it further enacted*, That if at any time there be a deficiency of water in a boiler, by suffering it to fall below three inches above the flue as prescribed in this act, unless the same happens through

inevitable accident, the master, if it be by his order, assent, or connivance, and also the engineer, or other person, whose duty it is to keep up the supply, shall be guilty of an offence for which they shall severally be fined one hundred dollars each; and if an explosion or collapse happens in consequence of such deficiency, they, or any of them, may be further punished by imprisonment, for a period of not less than six nor more than eighteen months.

SEC. 13. *And be it further enacted*, That hereafter all boilers of steamboats made of iron, shall be constructed of plates which have been stamped according to the provisions of this act.

SEC. 14. *And be it further enacted*, That it shall be the duty of such inspectors to ascertain the quality of the material of which the boiler-plates of any such boiler so submitted to their inspection are made; and to satisfy themselves by any suitable means, whether the mode of manufacturing has been such as to produce iron equal to good iron made with charcoal, such as in their judgment may be used for generating steam-power without hazard to life; and no such boiler shall be approved which is made of unsuitable material, or of which the manufacture is imperfect, or is not in their opinion, of suitable strength, or whose plates are less than one fourth of an inch in thickness, for a high-pressure boiler of forty-two inches in diameter, and in that proportion of strength according to the maximum of working pressure allowed for high-pressure boilers of greater or less diameter, or which is made of any but wrought iron of a quality equal to good iron made with charcoal.

SEC. 15. *And be it further enacted*, That all plates of boiler iron shall be distinctly and permanently stamped in such manner as the secretary of the treasury shall prescribe, and if practicable, in such place or places that the mark shall be left visible after the plates are worked into boilers; with the name of the manufacturer, the quality of the iron, and whether or not hammered, and the place where the same is manufactured.

SEC. 16. *And be it further enacted*, That it shall be unlawful to use in such vessels for generating steam for power, a boiler, or steam-pipe connecting the boilers made after the passage of this act, of any iron unless it has been stamped by the manufacturer as herein provided; and if any person shall make for use in any such vessel, a boiler of iron not so stamped, intended to generate steam for power, he shall, for any such offence, forfeit five hundred dollars, to be recovered in an action of debt by any person suing for the same; and any person using or causing to be used in any such vessel such a boiler to generate steam for power, shall forfeit a like sum for each offence.

SEC. 17. *And be it further enacted*, That if any person shall counterfeit the marks and stamps required by this act, or shall falsely stamp any

boiler iron, and be convicted thereof, he shall be fined not exceeding five hundred dollars and imprisoned not exceeding two years. And if any person or persons shall stamp or mark plates with the name or marks of another with intent to mislead, deceive, or defraud, such person or persons shall be liable to any one injured thereby, for all damage occasioned by such fraud or deception.

SEC. 18. *And be it further enacted*, That in order to carry this act fully into execution, the President of the United States shall, with the advice of the senate, appoint nine supervising inspectors, who shall be selected for their knowledge, skill, and experience in the uses of steam for navigation, and who are competent judges not only of the character of vessels but of all parts of the machinery employed in steaming, who shall assemble together at such places as they may agree upon once in each year at least, for joint consultation and the establishment of rules and regulations for their own conduct and that of the several boards of inspectors within the districts, and also to assign to each of the said nine inspectors the limits of territory within which he shall perform his duties. And the said supervising inspectors shall each be paid for his services after the rate of fifteen hundred dollars a year, and in addition thereto, his actual reasonable travelling expenses, incurred in the necessary performance of his duty when away from the principal port in his district, and certified and sworn to by him under such instructions as shall be given by the secretary of the treasury, who is hereby authorized to pay such salaries, and also such travelling expenses, and the actual reasonable expenses (both to them and other inspectors) of transporting from place to place the instruments used in inspections, which expenses shall be proved to his satisfaction.

SEC. 19. *And be it further enacted*, That the supervising inspectors shall watch over all parts of the territory assigned them, shall visit, confer with, and examine into the doings of the several boards of inspectors, and shall, whenever they think it expedient, visit such vessels, licensed, and examine into their condition, for the purpose of ascertaining whether the provisions of this act have been observed and complied with, both by the board of inspectors and the master and owners; and it shall be the duty of all masters, engineers, and pilots of such vessels, to answer all reasonable inquiries and to give all the information in their power, in regard to any such vessel so visited, and her machinery for steaming, and the manner of managing both.

SEC. 20. *And be it further enacted*, That whenever a supervising inspector ascertains to his satisfaction that the master, engineer, pilot, or owner of any such vessel fail to perform their duties according to the provisions of this act, he shall report the facts in writing to the board in the district where the vessel belongs, and, if need be, cause the negligent

or offending parties to be prosecuted; and if he has good reason to believe there has been, through negligence, or from any other cause, a failure of the board who inspected the vessel to do its duty, he shall report the facts in writing to the secretary of the treasury, who shall cause immediate investigation into the truth of the complaint, and if he deems the cause sufficient, shall remove the delinquent.

SEC. 21. *And be it further enacted*, That it shall be the duty of such supervising inspectors to see that the said several boards within their respective collection districts execute their duties faithfully, promptly, and, as far as possible, uniformly, in all places, by following out the provisions of this act, according to the true intent and meaning thereof; and they shall, as far as practicable by their established rules, harmonize differences of opinion when they exist in different boards.

SEC. 22. *And be it further enacted*, That the said supervising inspectors shall also visit collection districts in which there are no boards of inspectors, if there be any where steamers are owned or employed, and each one shall have full power to inspect any such steamer or boilers of each steamer in any such district, or in any other district where, from distance or other cause, it is inconvenient to resort to the local board, and to grant certificates of approval according to the provisions of this act, and to do and perform in such districts all the duties imposed upon boards in the districts where they exist: *Provided*, That no supervising or other inspector shall be deemed competent to inspect in any case where he is directly or indirectly personally interested, or is associated in business with any person who is so interested, but in all such cases the duty shall be performed by disinterested inspectors, and inspection made in violation of this rule shall be void and of no effect.

SEC. 23. *And be it further enacted*, That it shall be the duty of each of the collectors or other chief officer of the customs for the districts aforesaid, except San Francisco, to make known without delay, to the collectors of all the said districts, except San Francisco, the names of all persons licensed as engineers or pilots for such vessels, and the names of all persons from whom upon application, licenses have been withheld, and the names of all whose licenses have been revoked or suspended, and also the names of all such vessels which neglect or refuse to make such repairs as may be ordered under the provisions of this act, and the names of all for which license has been, on application, refused.

SEC. 24. *And be it further enacted*, That it shall be the duty of the collectors or other chief officers of the customs and of the inspectors aforesaid, within the said several districts, to enforce the provisions of law against all such steamers arriving and departing; and upon proof that any collector or other chief officer of the customs, or inspector, has negligently or intentionally omitted his duty in this particular, such delinquent

shall be removed from office, and shall also be subject to a penalty of one hundred dollars for each offence, to be sued for in an action of debt before any court of competent jurisdiction.

SEC. 25. *And be it further enacted*, That the collector or other chief officer of the customs, shall retain on file all original certificates of the inspectors required by this act to be delivered to him, and shall give to the master or owner of the vessel therein named, two certified copies thereof, one of which shall be placed by such master or owner in some conspicuous place in the vessel, where it will be most likely to be observed by passengers and others, and there kept at all times; the other shall be retained by such master or owner as evidence of the authority thereby conferred; and if any person shall receive or carry any passenger on board any such steamer not having a certified copy of the certificate of approval as required by this act, placed and kept as aforesaid; or who shall receive or carry any gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, or materials which ignite by friction, as freight, on board any steamer carrying passengers, not having a certificate authorizing the same, and a certified copy thereof placed and kept as aforesaid; or who shall stow or carry any of said articles, at a place or in a manner not authorized by such certificate, shall forfeit and pay for each offence one hundred dollars, to be recovered by action of debt in any court of competent jurisdiction.

SEC. 26. *And be it further enacted*, That every inspector who shall wilfully certify falsely touching any such vessel propelled in whole or in part by steam, and carrying passengers, her hull, accommodations, boilers, engines, machinery, or their appurtenances, or any of her equipments, or any matter or thing contained in any certificate signed and sworn to by him, shall on conviction thereof, be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both.

SEC. 27. *And be it further enacted*, That if any such vessel carrying passengers, having a license and certificate, as required by this act, shall be navigated without having her hull, accommodations, boilers, engines, machinery, and their appurtenances, and all equipments, in all things conformable to such certificate, the master or commander by whom she shall be so navigated, having knowledge of such defect, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding two months, or both: *Provided*, That such master or commander shall not be liable for loss or deficiency occasioned by the dangers of navigation, if such loss or deficiency shall be supplied as soon as practicable.

SEC. 28. *And be it further enacted*, That on any such steamers navigating rivers only, when from darkness, fog, or other cause, the pilot on watch shall be of opinion that the navigation is unsafe, or from accident to, or derangement of the machinery of the boat, the engineer on watch

shall be of opinion that the further navigation of the vessel is unsafe, the vessel shall be brought to anchor, or moored, as soon as it prudently can be done: *Provided*, That if the person in command shall, after being so admonished by either of such officers, elect to pursue such voyage, he may do the same; but in such case both he and the owners of such steamer shall be answerable for all damages which shall arise to the person of any passenger and his baggage from said causes in so pursuing the voyage, and no degree of care or diligence shall in such case be held to justify or excuse the person in command, or said owners.

SEC. 29. *And be it further enacted*, That it shall be the duty of the supervising inspectors to establish such rules and regulations to be observed by all such vessels in passing each other, as they shall from time to time deem necessary for safety; two printed copies of which rules and regulations, signed by said inspectors, shall be furnished to each of such vessels, and shall at all times be kept up in conspicuous places on such vessels, which rules shall be observed both night and day. Should any pilot, engineer, or master of any such vessel neglect or wilfully refuse to observe the foregoing regulations, any delinquent so neglecting or refusing, shall be liable to a penalty of thirty dollars, and to all damage done to any passenger, in his person or baggage, by such neglect or refusal; and no such vessel shall be justified in coming into collision with another if it can be avoided.

SEC. 30. *And be it further enacted*, That whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus, or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot, and recover damages for any such injury caused as aforesaid by any such engineer or pilot.

SEC. 31. *And be it further enacted*, That before issuing the annual license to any such steamer, the collector or other chief officer of the customs for the port or district, shall demand and receive from the owner or owners of the steamer, as a compensation for the inspections and examinations made for the year, the following sums, in addition to the fees for issuing enrolments and licenses, now allowed by law, according to the tonnage of the vessel, to wit: for each vessel of a thousand tons and over, thirty-five dollars; for each of five hundred tons and over, but less than one thousand tons, thirty dollars; and for each under five hundred tons

and over one hundred and twenty-five tons, twenty-five dollars; and for each under one hundred and twenty-five tons, twenty dollars, at the time of obtaining registry, and once in each year thereafter, pay according to the rate of tonnage before mentioned, the sum of money herein fixed. And each engineer and pilot licensed as herein provided, shall pay for the first certificate granted by any inspector or inspectors, the sum of five dollars, and for each subsequent certificate one dollar, to such inspector or inspectors, to be accounted for and paid over to the collector or other chief officer of the customs; and the sums derived from all the sources above specified shall be quarterly accounted for and paid over to the United States in the same manner as other revenue.

Sec. 32. *And be it further enacted*, That each inspector shall keep an accurate account of every such steamer boarded by him during the year, and of all his official acts and doings, which in the form of a report he shall communicate to the collector or other chief officer of the customs, on the first days of May and November, in each year.

Sec. 33. *And be it further enacted*, That the inspectors in the following districts shall each be allowed annually, the following compensation, to be paid under the direction of the secretary of the treasury, in the manner officers of the revenue are paid, to wit:

For the district of Portland, in Maine, three hundred dollars.

For the district of Boston and Charlestown, in Massachusetts, eight hundred dollars.

For the district of New London, in Connecticut, three hundred dollars.

For the district of New York, two thousand dollars.

For the district of Philadelphia, in Pennsylvania, one thousand dollars.

For the district of Baltimore, in Maryland, one thousand dollars.

For the district of Norfolk, in Virginia, three hundred dollars.

For the district of Charleston, in South Carolina, four hundred dollars.

For the district of Savannah, in Georgia, four hundred dollars.

For the district of Mobile, in Alabama, one thousand dollars.

For the district of New Orleans, or in which New Orleans is the port of entry, in Louisiana, two thousand dollars.

For the district of Galveston, in Texas, three hundred dollars.

For the district of St. Louis, in Missouri, fifteen hundred dollars.

For the district of Nashville, in Tennessee, four hundred dollars.

For the district of Louisville, in Kentucky, twelve hundred dollars.

For the district of Cincinnati, Ohio, fifteen hundred dollars.

For the district of Wheeling, Virginia, five hundred dollars.

For the district of Pittsburgh, Pennsylvania, fifteen hundred dollars.

For the district of Chicago, Illinois, five hundred dollars.

For the district of Detroit, Michigan, eight hundred dollars.

For the district of Cleveland, Ohio, five hundred dollars.

For the district of Buffalo, New York, twelve hundred dollars.

For the district of Oswego, or of which Oswego is the port of entry, New York, three hundred dollars.

For the district of Vermont, two hundred dollars.

For the district of San Francisco, California, fifteen hundred dollars.

SEC. 34. *And be it further enacted*, That the secretary of the treasury shall provide the inspectors with a suitable number of instruments, of uniform construction, so as to give uniform results to test the strength of boilers.

SEC. 35. *And be it further enacted*, That it shall be the duty of the master of any such steamer to cause to be kept a correct list of all the passengers received and delivered from day to day, noting the places where received and where landed, which record shall be open to the inspection of the inspectors and officers of the customs at all times; and in case of default, through negligence or design, the said master shall forfeit one hundred dollars, which penalty, as well as that for excess of passengers, shall be a lien upon the vessel: *Provided*, however, a bond may, as provided for in other cases, be given to secure the satisfaction of the judgment.

SEC. 36. *And be it further enacted*, That every master or commander of any such steamer, shall keep on board of such steamer, at least two copies of this act to be furnished to him by the secretary of the treasury; and if the master or commander neglects or refuses so to do, or shall unreasonably refuse to exhibit a copy of the same to any passenger who shall ask it, he shall forfeit twenty dollars.

SEC. 37. *And be it further enacted*, That any inspector who shall, upon any pretence, receive any fee or reward for his services rendered under this act, except what is herein allowed to him, shall forfeit his office; and if found guilty, on indictment, be otherwise punished, according to the aggravation of the offence, by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both.

SEC. 38. *And be it further enacted*, That all engineers and pilots of any such vessel shall, before entering upon their duties, make solemn oath before one of the inspectors herein provided for, to be recorded with the certificate, that he will faithfully and honestly, according to his best skill and judgment, perform all the duties required of him by this act, without concealment or reservation; and if any such engineer, pilot, or any witness summoned under this act as a witness, shall, when under exami-

nation on oath, knowingly and intentionally falsify the truth, such person shall be deemed guilty of perjury, and if convicted be punished accordingly.

SEC. 39. *And be it further enacted*, That the supervising inspectors appointed under the provisions of this act, shall, within their respective districts, under the direction of the secretary of the treasury, take the examination, or receive the statements in writing, of persons of practical knowledge and experience in the navigation of steam vessels, the construction and use of boilers, engines, machinery, and equipments, touching the form, material, and construction of engines and their appurtenances; the causes of the explosion of boilers and collapse of flues and the means of prevention; the kind and description of safety-valves, water and steam gauges or indicators; equipments for the extinguishment of fires, and for the preservation of life in case of accident, on board of such vessels, and all other means in use or proper to be adopted, for the better security of the lives of persons on board vessels propelled in whole or in part by steam; the advantages and disadvantages of the different descriptions of boilers, engines, and their appurtenances, safety-valves, water and steam gauges or indicators, equipments for the prevention or extinguishment of fires, and the preservation of life in case of accident, in use on board such vessels; whether any, and what further legislation is necessary or proper for the better security of the lives of persons on board such steam vessels; which examination and statements so taken and received shall be transmitted to the secretary of the treasury, at such time as he shall prescribe.

SEC. 40. *And be it further enacted*, That it shall be the duty of the secretary of the treasury to cause such interrogatories to be prepared and published as in his opinion may be proper to elicit the information contemplated by the preceding section, and upon the receipt of the examination and statements taken by the inspectors shall report the same to Congress, together with the recommendation of such further provisions as he may deem proper to be made for the better security of the lives of persons on board steam vessels.

SEC. 41. *And be it further enacted*, That all penalties imposed by this act may be recovered in an action of debt by any person who will sue therefor in any court of the United States.

SEC. 42. *And be it further enacted*, That this act shall not apply to public vessels of the United States or vessels of other countries; nor to steamers used as ferry-boats, tug-boats, towing-boats, nor to steamers not exceeding one hundred and fifty tons burden and used in whole or in part for navigating canals. The inspection and certificate required by this act shall in all cases of ocean steamers constructed under contract with the United States for the purpose, if desired, of being converted into war

steamers, be made by a chief engineer of the navy, to be detailed for that service by the secretary of the navy, and he shall report both to said secretary and to the supervising inspector of the district where he shall make any inspection.

SEC. 43. *And be it further enacted*, That all such parts of this act as authorize the appointment and qualification of inspectors, and the licensing of engineers and pilots, shall take effect upon the passage thereof, and that all other parts of this act shall go into effect at the times and places as follows: In the districts of New Orleans, St. Louis, Louisville, Cincinnati, Wheeling, Pittsburgh, Nashville, Mobile, and Galveston, on the first day of January next, and in all other districts on the first day of March next. .

SEC. 44. *And be it further enacted*, That all parts of laws heretofore made, which are suspended by or are inconsistent with this act, are hereby repealed.

ACT OF 1852, CHAPTER CXIII. (10 U. S. Stats. at Large, 140).

An Act to establish certain Post-roads, and for other Purposes.

SEC. 5. *And be it further enacted*, That no collector or other officer of the customs, shall permit any ship or vessel, arriving within any port or collection district of the United States, to make entry or break bulk until all letters on board the same shall be delivered into the post-office at or nearest said port or place, nor until the captain or commander of such ship or vessel shall have signed and sworn to a declaration before such collector or officer of the customs, in the form and to the effect following, that is to say:

"I, A. B., commander of the (state the name of the ship or vessel) arriving from (state the place), and now lying in the port of (state the name of the port), do, as required by law, solemnly swear (or affirm, as the case may be) that I have, to the best of my knowledge or belief, delivered or caused to be delivered into the post-office at or nearest said port, every letter and every bag, parcel, or package of letters that were on board the (state the name of the ship or vessel) during her last voyage, and that I have so delivered or caused to be delivered all such letters, bags, parcels, and packages as were in my possession or under my power or control."

And the collector and every officer of the customs at every port, without special instructions, and every special agent of the post-office department, when instructed by the postmaster-general to make examinations and seizures, shall carefully search every vessel for letters which may be

on board, or have been carried or transported contrary to law; and each and every of such officers and agents, and every marshal of the United States and his deputies, shall at all times have power to seize all letters, and packages, and parcels, containing letters which shall have been sent or conveyed contrary to law on board any ship or vessel, or on or over any post-route of the United States, and to convey such letters to the nearest post-office; or may, if the postmaster-general and the secretary of the treasury shall so direct, detain the said letters, or any part thereof, until two months after the trial and final determination of all suits and proceedings which may at any time, within six months after such seizure, be brought against any person for sending, or carrying, or transporting any such letters contrary to any provisions of any act of Congress; and one half of any penalties that may be recovered for the illegal sending, carrying, or transportation of any such letters shall be paid to the officer so seizing, and the other half to the use of the post-office department; and every package or parcel so seized, in which any letter shall be concealed, shall be forfeited to the United States, and the same proceedings may be had to enforce such forfeiture as are authorized in respect to good[s], wares, and merchandise forfeited by reason of any violation of the revenue laws of the United States; and all laws for the benefit and protection of officers of the customs seizing goods, wares, or merchandise, for a violation of any revenue law of the United States, shall apply to the officers and agents making seizures by virtue of this act.

ACT OF 1852, CHAPTER IV. (10 U. S. Stats. at Large, 149).

An Act authorizing the Secretary of the Treasury to issue Registers to Vessels in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the secretary of the treasury be, and he hereby is, authorized to issue a register or enrolment for any vessel built in a foreign country, whenever such vessel may have been or shall hereafter be wrecked in the United States, and have been, or shall hereafter be, purchased and repaired by a citizen or citizens thereof: *Provided*, That it shall be proved to the satisfaction of the secretary of the treasury that the repairs put upon such vessel shall be equal to three fourths of the cost of said vessel when so repaired.

ACT OF 1853, CHAPTER LXXX. (10 U. S. Stats. at Large, 168).

Compensation to Seamen sent home as Witnesses.

There shall be paid to such seaman or other person as has been or shall be sent to the United States from any foreign port, station, sea, or ocean, by any United States minister, chargé d'affaires, consul, commander, or captain, to give testimony in any criminal case which has been or may be depending in any court of the United States, such compensation as the court which had or shall have cognizance of the crime, shall adjudge to be right and proper, not to exceed one dollar for each day the said seaman or person has been or shall be necessarily on the voyage, and arriving at the place of examination or trial, exclusive of sustenance and transportation; the court to take into consideration, in fixing said compensation, the condition of said seaman or witness; whether his voyage has been broken up, to his injury, by his being sent to the United States, or not.

If the said seaman or person has been or shall be transported in an armed vessel of the United States, no charge for sustenance or transportation shall be made; if in any other vessel, the court may adjudge what compensation shall be paid to the captain of said vessel, and the same shall be paid accordingly: *Provided*, That in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem.

ACT OF 1853, CHAPTER XCVI. (10 U. S. Stats. at Large, 182).

An Act to Supply Deficiencies in the Appropriations for the Service of the Fiscal Year ending the thirtieth of June, one thousand eight hundred and fifty-three.

For expenses which may be incurred in acknowledging the services of the masters and crews of foreign vessels in rescuing American citizens and American vessels from shipwreck, two thousand dollars: *Provided*, That the money shall be expended under the direction of the President of the United States.

ACT OF 1855, CHAPTER CXXXIII. (10 U. S. Stats. at Large, 624).

An Act to Remodel the Diplomatic and Consular Systems of the United States.

SEC. 15. *And be it further enacted*, That no consul or commercial agent of the United States shall discharge any mariner, being a citizen

of the United States, in a foreign port, without requiring the payment of the two months' wages to which said mariner is entitled under the provisions of the act of February twenty-eight, eighteen hundred and three, unless, upon due investigation into the circumstances under which the master and mariner have jointly applied for such discharge, and on a private examination of such mariner by the consul or commercial agent, separate and apart from all officers of the vessel, the consul or commercial agent shall be satisfied that it is for the interest and welfare of such mariner to be so discharged; nor shall any consul or commercial agent discharge any mariner as aforesaid without requiring the full amount of three months' wages, as provided by the above-named act, unless under such circumstances as will, in his judgment, secure the United States from all liability to expense on account of such mariner: *Provided*, That in the cases of stranded vessels, or vessels condemned as unfit for service, no payment of extra wages shall be required; and where any mariner, after his discharge, shall have incurred expense at the port of discharge before shipping again, such expense shall be paid out of the two months' wages aforesaid, and the balance only delivered to him.

SEC. 16. *And be it further enacted*, That every consul and commercial agent of the United States shall keep a detailed list of all mariners discharged by them respectively, specifying their names and the names of the vessels from which they were discharged, and the payments, if any, afterwards made on account of each, and shall make official returns of said lists half-yearly to the treasury department.

SEC. 17. *And be it further enacted*, That every consul and commercial agent of the United States shall make an official entry of every discharge which they may grant, respectively, on the list of the crew and shipping articles of the vessel from which such discharge shall be made, specifying the payment, if any, which has been required in each case; and if they shall have remitted the payment of the two months' wages to which the mariner is entitled, they shall also certify on said shipping list and articles that they have allowed the remission, upon the joint application of the master and mariner therefor, after a separate examination of the mariner, after a due investigation of all the circumstances, and after being satisfied that the discharge so allowed, without said payment, is for the interest and welfare of the mariner; and if they shall have remitted the payment of the one month's wages to which the United States is entitled, they shall certify that they have allowed the remission, after a due investigation of all the circumstances, and after being satisfied that they are such as will, in their judgment, secure the United States from all liability to expense on account of such mariner; and a copy of all such entries and certificates shall be annually transmitted to the treasury de-

partment by the proper officers of the customs in the several ports of the United States.

SEC. 18. *And be it further enacted*, That if any consul or commercial agent of the United States, upon discharging a mariner without requiring the payment of the one month's wages to which the United States is entitled, shall neglect to certify in the manner required in such case by the preceding section of this act, he shall be accountable to the treasury department for the sum so remitted. And in any action brought by a mariner to recover the extra wages to which he is entitled under the act of February twenty-eighth, eighteen hundred and three, the defence that the payment of such wages was duly remitted shall not be sustained without the production of the certificate in such case required by this act, or, when its non-production is accounted for, by the production of a certified copy thereof; and the truth of the facts certified to, and the propriety of the remission, shall be still open to investigation.

SEC. 19. *And be it further enacted*, That if, upon the application of any mariner, it shall appear to the consul or commercial agent that he is entitled to his discharge under any act of Congress, or according to the general principles of the maritime law as recognized in the United States, he shall discharge such mariner, and shall require of the master the payment of three months' wages, as provided in the act of February twenty-eighth, eighteen hundred and three, and shall not remit the same, or any part thereof, except in the cases mentioned in the proviso of the ninth clause of the first section of the act of July twentieth, eighteen hundred and forty, to the following effect: "If the consul or other commercial agent shall be satisfied the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, then he may, if he deems it just, discharge the mariner without exacting the three months' additional pay."

SEC. 20. *And be it further enacted*, That every consul and commercial agent, for any neglect to perform the duties enjoined upon him by this act, shall be liable to any injured person for all damages occasioned thereby; and, for any violation of the provisions of the fifteenth and nineteenth sections of this act, shall also be liable to indictment, and to a penalty in the manner provided by the eighteenth clause of the first section of the act of July twentieth, eighteen hundred and forty.

ACT OF 1855, CHAPTER CCXIII. (10 U. S. Stats. at Large, 715).

An Act to Regulate the Carriage of Passengers in Steamships and other Vessels.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no master of any vessel owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place other than foreign contiguous territory of the United States, a greater number of passengers than in proportion of one to every two tons of such vessel, not including children under the age of one year in the computation, and computing two children over one and under eight years of age as one passenger. That the spaces appropriated for the use of such passengers, and which shall not be occupied by stores or other goods, not the personal baggage of such passengers, shall be in the following proportions, viz.: On the main and poop decks or platforms, and in the deck houses, if there be any, one passenger for each sixteen clear superficial feet of deck, if the height or distance between the decks or platform shall not be less than six feet; and on the lower deck (not being an orlop deck), if any, one passenger for eighteen such clear superficial feet, if the height or distance between the decks or platforms shall not be less than six feet, but so as that no passenger shall be carried on any other deck or platform, nor upon any deck where the height or distance between decks is less than six feet, with intent to bring such passenger to the United States, and shall leave such port or place and bring the same, or any number thereof, within the jurisdiction of the United States; or if any such master of any vessel shall take on board his vessel, at any port or place within the jurisdiction of the United States, any greater number of passengers than in the proportion aforesaid, to the space aforesaid, or to the tonnage aforesaid, with intent to carry the same to any foreign port or place other than foreign contiguous territory as aforesaid, every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any circuit or district court of the United States, shall, for each passenger taken on board beyond the limit aforesaid, or the space aforesaid, be fined in the sum of fifty dollars, and may also be imprisoned, at the discretion of the judge before whom the penalty shall be recovered, not exceeding six months; but should it be necessary, for the safety or convenience of the vessel, that any portion of her cargo, or any other articles or article, should be placed on, or stored in, any of the decks, cabins, or other places appropriated to the use of passengers, the same may be placed in lockers or enclosures prepared for the purpose, on an exterior surface impervious to the wave, capable of being cleansed in like manner as the decks or platforms of the

vessel. In no case, however, shall the places thus provided be deemed to be a part of the space allowable for the use of passengers, but the same shall be deducted therefrom, and in all cases where prepared or used, the upper surface of said lockers on enclosed spaces shall be deemed and taken to be the deck or platform from which measurement shall be made for all the purposes of this act. It is also provided, that one hospital, in the spaces appropriated to passengers, and separate therefrom by an appropriate partition, and furnished as its purposes require, may be prepared, and, when used, may be included in the space allowable for passengers, but the same shall not occupy more than one hundred superficial feet of deck or platform: *Provided*, That on board two-deck ships, where the height between the decks is seven and one half feet or more, fourteen clear superficial feet of deck shall be the proportion required for each passenger.

SEC. 2. *And be it further enacted*, That no such vessel shall have more than two tiers of berths, and the interval, between the lowest part thereof and the deck or platform beneath, shall not be less than nine inches, and the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions, as berths ordinarily are separated, and shall be at least six feet in length, and at least two feet in width, and each berth shall be occupied by no more than one passenger; but double berths of twice the above width may be constructed, each berth to be occupied by no more, and by no other, than two women, or by one woman and two children under the age of eight years, or by husband and wife, or by a man and two of his own children under the age of eight years, or by two men, members of the same family; and if there shall be any violation of this section in any of its provisions, then the master of the vessel, and the owners thereof, shall severally forfeit and pay the sum of five dollars for each passenger on board of said vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart.

SEC. 3. *And be it further enacted*, That all vessels, whether of the United States or any foreign country, having sufficient capacity or space, according to law, for fifty or more passengers (other than cabin passengers), shall, when employed in transporting such passengers between the United States and Europe, have, on the upper deck, for the use of such passengers, a house over the passage-way leading to the apartments allotted to such passengers below deck, firmly secured to the deck or combings of the hatch, with two doors, the sills of which shall be at least one foot above the deck, so constructed, that one door or window in such house may at all times be left open for ventilation; and all vessels so employed, and having the capacity to carry one hundred and fifty such passengers or more, shall have two such houses; and the stairs or ladder,

leading down to the aforesaid department, shall be furnished with a hand-rail of wood or strong rope; but booby hatches may be substituted for such houses.

SEC. 4. *And be it further enacted*, That every such vessel so employed, and having the legal capacity for more than one hundred such passengers, shall have at least two ventilators to purify the apartment or apartments occupied by such passengers; one of which shall be inserted in the after part of the apartment or apartments, and the other shall be placed in the forward portion of the apartment or apartments, and one of them shall have an exhausting cap to carry off the foul air, and the other a receiving cap to carry down the fresh air; which said ventilators shall have a capacity proportioned to the size of the apartment or apartments to be purified, namely: if the apartment or apartments will lawfully authorize the reception of two hundred such passengers, the capacity of such ventilators shall each be equal to a tube of twelve inches diameter in the clear, and in proportion for larger or smaller apartments; and all said ventilators shall rise at least four feet six inches above the upper deck of any such vessel, and be of the most approved form and construction; but if it shall appear, from the report, to be made and approved, as hereinafter provided, that such vessel is equally well ventilated by any other means, such other means of ventilation shall be deemed and held to be a compliance with the provisions of this section.

SEC. 5. *And be it further enacted*, That every vessel carrying more than fifty such passengers, shall have for their use on deck, housed and conveniently arranged, at least one camboose or cooking range, the dimensions of which shall be equal to four feet long and one foot six inches wide for every two hundred passengers; and provision shall be made in the manner aforesaid, in this ratio, for a greater or less number of passengers; but nothing herein contained shall take away the right to make such arrangements for cooking between decks, if that shall be deemed desirable.

SEC. 6. *And be it further enacted*, That all vessels employed as aforesaid, shall have on board, for the use of such passengers, at the time of leaving the last port whence such vessel shall sail, well secured under deck, for each passenger, at least twenty pounds of good navy bread, fifteen pounds of rice, fifteen pounds of oatmeal, ten pounds of wheat flour, fifteen pounds of peas and beans, twenty pounds of potatoes, one pint of vinegar, sixty gallons of fresh water, ten pounds of salted pork, and ten pounds of salt beef, free of bone, all to be of good quality; but at places where either rice, oatmeal, wheat flour, or peas and beans cannot be procured, of good quality and on reasonable terms, the quantity of either or any of the other last-named articles may be increased and sub-

stituted therefor; and, in case potatoes cannot be procured on reasonable terms, one pound of either of said articles may be substituted in lieu of five pounds of potatoes; and the captains of such vessels shall deliver to each passenger at least one tenth part of the aforesaid provisions weekly, commencing on the day of sailing, and at least three quarts of water daily; and if the passengers on board of any such vessel in which the provisions and water herein required shall not have been provided as aforesaid, shall, at any time, be put on short allowance during any voyage, the master or owner of any such vessel shall pay to each and every passenger who shall have been put on short allowance, the sum of three dollars for each and every day they may have been put on short allowance, to be recovered in the circuit or district court of the United States; and it shall be the duty of the captain or master of every such ship or vessel to cause the food and provisions of all the passengers to be well and properly cooked daily, and to be served out and distributed to them at regular and stated hours, by messes, or in such other manner as shall be deemed best and most conducive to the health and comfort of such passengers, of which hours and manner of distribution, due and sufficient notice shall be given. If the captain or master of any such ship or vessel, shall wilfully fail to furnish and distribute such provisions, cooked as aforesaid, he shall be deemed guilty of a misdemeanor, and upon conviction thereof before any circuit or district court of the United States, shall be fined not more than one thousand dollars, and shall be imprisoned for a term not exceeding one year: *Provided*, That the enforcement of this penalty shall not affect the civil responsibility of the captain or master and owners, to such passengers as may have suffered from said default.

Sec. 7. *And be it further enacted*, That the captain of any such vessel so employed, is hereby authorized to maintain good discipline and such habits of cleanliness among such passengers as will tend to the preservation and promotion of health; and to that end he shall cause such regulations as he may adopt for this purpose to be posted up, before sailing, on board such vessel, in a place accessible to such passengers, and shall keep the same so posted up during the voyage; and it is hereby made the duty of said captain to cause the apartments occupied by such passengers to be kept at all times in a clean, healthy state; and the owners of every such vessel so employed, are required to construct the decks and all parts of said apartment so that it can be thoroughly cleansed; and they shall also provide a safe, convenient privy or water-closet for the exclusive use of every one hundred such passengers. And when the weather is such that said passengers cannot be mustered on deck with their bedding, it shall be the duty of the captain of every such vessel to

cause the deck, occupied by such passengers, to be cleansed with chloride of lime, or some other equally efficient disinfecting agent, and also at such other times as said captain may deem necessary.

SEC. 8. *And be it further enacted*, That the master and owner or owners of any such vessel so employed, which shall not be provided with the house or houses over the passage-ways, as prescribed in the third section of this chapter, or with ventilators as prescribed in the fourth section of this chapter, or with the cambooses or cooking ranges, with the houses over them, as prescribed in the fifth section of this chapter, shall severally forfeit and pay to the United States the sum of two hundred dollars for each and every violation of, or neglect to conform to, the provisions of each of said sections, and fifty dollars for each and every neglect or violation of any of the provisions of the seventh section of this chapter, to be recovered by suit in any circuit or district court of the United States within the jurisdiction of which the said vessel may arrive, or from which she may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or owners, or captain of such vessel may be found.

SEC. 9. *And be it further enacted*, That the collector of the customs at any port of the United States, at which any vessel so employed shall arrive, or from which any such vessel shall be about to depart, shall appoint and direct one or more of the inspectors of the customs for such port, to examine such vessel, and report in writing to such collector, whether the requirements of law have been complied with in respect to such vessel; and if such report shall state such compliance, and shall be approved by such collector, it shall be deemed and held as *primâ facie* evidence thereof.

SEC. 10. *And be it further enacted*, That the provisions, requisitions, penalties, and liens of this act, relating to the space in vessels appropriated to the use of passengers, are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and to the masters thereof; and so much of the act entitled "An act to amend an act entitled an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes," approved August thirtieth, eighteen hundred and fifty-two, as conflicts with this act, is hereby repealed; and the space appropriated to the use of steerage passengers in vessels so as above propelled and navigated, is hereby subject to the supervision and inspection of the collector of the customs at any port of the United States at which any such vessel shall arrive, or from which she shall be about to depart; and the same shall be examined and reported in the same manner and

by the same officers by the next preceding section directed to examine and report.

Sec. 11. *And be it further enacted*, That the vessels bound from any port in the United States to any port or place in the Pacific Ocean, or on its tributaries, or from any such port or place to any port in the United States on the Atlantic or its tributaries, shall be subject to the foregoing provisions regulating the carriage of passengers in merchant vessels, except so much as relates to provisions and water; but the owners and masters of all such vessels shall in all cases furnish to each passenger the daily supply of water therein mentioned; and they shall furnish a sufficient supply of good and wholesome food, properly cooked; and in case they shall fail so to do, or shall provide unwholesome or unsuitable provisions, they shall be subject to the penalty provided in the sixth section of this chapter, in case the passengers are put on short allowance of water or provisions.

Sec. 12. *And be it further enacted*, That the captain or master of any ship or vessel arriving in the United States, or any of the territories thereof, from any foreign place whatever, at the same time that he delivers a manifest of the cargo, and if there be no cargo, then at the time of making report or entry of the ship or vessel, pursuant to law, shall also deliver and report to the collector of the district in which such ship or vessel shall arrive, a list or manifest of all the passengers taken on board of the said ship or vessel at any foreign port or place; in which list or manifest it shall be the duty of the said master to designate particularly the age, sex, and occupation of the said passengers respectively, the part of the vessel occupied by each during the voyage, the country to which they severally belong, and that of which it is their intention to become inhabitants; and shall further set forth whether any and what number have died on the voyage; which list or manifest shall be sworn to by the said master, in the same manner as directed by law in relation to the manifest of the cargo; and the refusal or neglect of the master aforesaid to comply with the provisions of this section, or any part thereof, shall incur the same penalties, disabilities, and forfeitures as are provided for a refusal or neglect to report and deliver a manifest of the cargo aforesaid.

Sec. 13. *And be it further enacted*, That each and every collector of the customs, to whom such manifest or list of passengers as aforesaid shall be delivered, shall quarter-yearly return copies thereof to the secretary of state of the United States, by whom statements of the same shall be laid before congress at each and every session.

Sec. 14. *And be it further enacted*, That in case there shall have occurred on board any ship or vessel arriving at any port or place within the United States or its territories, any death or deaths among the passengers

(other than cabin passengers), the master, or captain, or owner, or consignee of such ship or vessel, shall, within twenty-four hours after the time within which the report and list or manifest of passengers mentioned in section twelve of this act, is required to be delivered to the collector of the customs, pay to the said collector the sum of ten dollars for each and every passenger above the age of eight years, who shall have died on the voyage by natural disease; and the said collector shall pay the money thus received, at such times and in such manner as the secretary of the treasury, by general rules, shall direct, to any board or commission appointed by and acting under the authority of the State within which the port where such ship or vessel arrived is situated, for the care and protection of sick, indigent, or destitute emigrants, to be applied to the objects of their appointment; and if there be more than one board or commission who shall claim such payment, the secretary of the treasury, for the time being, shall determine which is entitled to receive the same, and his decision in the premises shall be final and without appeal: *Provided*, That the payment shall, in no case, be awarded or made to any board, or commission, or association, formed for the protection or advancement of any particular class of emigrants, or emigrants of any particular nation or creed; and if the master, captain, owner, or consignee of any ship or vessel, refuse or neglect to pay to the collector the sum and sums of money required, and within the time prescribed by this section, he or they shall severally forfeit and pay the sum of fifty dollars, in addition to such sum of ten dollars, for each and every passenger upon whose death the same has become payable, to be recovered by the United States, in any circuit or district court of the United States where such vessel may arrive, or such master, captain, owner, or consignee may reside; and when recovered, the said money shall be disposed of in the same manner as is directed with respect to the sum and sums required to be paid to the collector of customs.

SEC. 15. *And be it further enacted*, That the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels, shall be liens on the vessel or vessels violating those provisions, and such vessel or vessels shall be libelled therefor in any circuit or district court of the United States, where such vessel or vessels shall arrive.

SEC. 16. *And be it further enacted*, That all and every vessel or vessels which shall or may be employed by the American Colonization Society or the colonization society of any State, to transport, and which shall actually transport, from any port or ports of the United States to any colony or colonies on the west coast of Africa, colored emigrants, to reside there, shall be, and the same are hereby, subjected to the operation of the

foregoing provisions, regulating the carriage of passengers in merchant vessels.

SEC. 17. *And be it further enacted*, That the collector of the customs shall examine each emigrant ship or vessel, on its arrival at his port, and ascertain and report to the secretary of the treasury the time of sailing, the length of the voyage, the ventilation, the number of passengers, their space on board, their food, the native country of the emigrants, the number of deaths, the age and sex of those who died during the voyage; together with his opinion of the cause of the mortality, if any, on board, and, if none, what precautionary measures, arrangements, or habits are supposed to have had any, and what agency in causing the exemption.

SEC. 18. *And be it further enacted*, That this act shall take effect, with respect to vessels sailing from ports in the United States on the eastern side of the continent, within thirty days from the time of its approval; and with respect to vessels sailing from ports in the United States on the western side of the continent, and from ports in Europe, within sixty days from the time of its approval; and with respect to vessels sailing from ports in other parts of the world, within six months from the time of its approval.

And it is hereby made the duty of the secretary of state to give notice, in the ports of Europe, and elsewhere, of this act, in such manner as he shall deem proper.

SEC. 19. *And be it further enacted*, That from and after the time that this act shall take effect with respect to any vessels, then, in respect to such vessels, the act of second March, eighteen hundred and nineteen, entitled "An act regulating passenger ships and vessels," the act of twenty-second of February, eighteen hundred and forty-seven, entitled "An act to regulate the carriage of passengers in merchant vessels;" the act of second March, eighteen hundred and forty-seven, entitled "An act to amend an act entitled 'An act to regulate the carriage of passengers in merchant vessels,' and to determine the time when said act shall take effect;" the act of thirty-first January, eighteen hundred and forty-eight, entitled "An act exempting vessels employed by the American Colonization Society in transporting colored emigrants from the United States to the coast of Africa from the provisions of the acts of the twenty-second February and second of March, eighteen hundred and forty-seven, regulating the carriage of passengers in merchant vessels;" the act of seventeenth May, eighteen hundred and forty-eight, entitled "An act to provide for the ventilation of passenger vessels, and for other purposes;" and the act of third March, eighteen hundred and forty-nine, entitled "An act to extend the provisions of all laws now in force relating to the carriage of passengers in merchant vessels, and the regulation thereof," are hereby

repealed. But nothing in this act contained shall in anywise obstruct or prevent the prosecution, recovery, distribution, or remission of any fines, penalties, or forfeitures, which may have been incurred in respect to any vessels prior to the day this act goes into effect, in respect to such vessels, under the laws hereby repealed, for which purpose the said laws shall continue in force.

But the secretary of the treasury may, in his discretion, and upon such conditions as he shall think proper, discontinue any such prosecutions, or remit or modify such penalties.

ACT OF 1856, CHAPTER IV. (11 U. S. Stats. at Large, 1).

An Act authorizing the Secretary of the Treasury to change the Names of Vessels in certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the secretary of the treasury be, and hereby is, authorized to permit the owner or owners of any vessel to change the name of the same, when, in his opinion, there shall be sufficient cause for so doing; and he may establish such rules and regulations as he shall deem proper for that purpose.

ACT OF 1856, CHAPTER CXXVII. (11 U. S. Stats. at Large, 59).

An Act to Regulate the Diplomatic and Consular Systems of the United States, and to provide for the Discharge and Desertion of Seamen.

SEC. 20. *And be it further enacted*, That the compensation provided by this act shall be in full for all the services and personal expenses which shall be rendered or incurred by the officers or persons respectively for whom such compensation is provided, of whatever nature or kind such services or personal expenses may be, or by whatever treaty, law, or instructions such services or personal expenses so rendered or incurred are or shall be required; and no allowance, other than such as is provided by this act, shall be made in any case for the outfit or return home of any such officer or person; and no consular officer shall, nor shall any person under any consular officer, make any charge or receive, directly or indirectly, any compensation, by way of commission or otherwise, for receiving or disbursing the wages or extra wages to which any seaman or mariner shall be entitled who shall be discharged in any foreign country, or for any money advanced to any such seaman or mariner who shall seek relief from any consulate or commercial agency; nor shall any consular officer, or any person under any consular officer, be interested, directly or indi-

rectly, in any profit derived from clothing, boarding, or otherwise supplying or sending home any such seaman or mariner: *Provided*, That such prohibition as to profit shall not be construed to relieve or prevent any such officer who shall be the owner or otherwise interested in any ship or vessel of the United States, from transporting in such ship or vessel any such seaman or mariner, or from receiving or being interested in such reasonable allowance as may be made for such transportation, under and by virtue of the fourth section of the act, entitled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," approved February twenty-eighth, eighteen hundred and three.

SEC. 25. *And be it further enacted*, That whenever any seaman or mariner of any vessel of the United States shall desert such vessel, the master or commander of such vessel shall note the fact and date of such desertion on the list of the crew, and the same shall be officially authenticated at the port or place of the consulate or commercial agency first visited by such vessel after such desertion, if such desertion shall have occurred in a foreign country, or if in such case such vessel shall not visit any place where there shall be any consulate or commercial agency before her return to the United States, or the desertion shall have occurred in this country, the fact and time of such desertion shall be officially authenticated before a notary-public immediately at the first port or place where such vessel shall arrive after such desertion; and all wages that may be due to such seaman or mariner, and whatever interest he may have in the cargo of such vessel, shall be forfeited to and become the property of the United States, and paid over for their use to the collector of the port where the crew of such vessel are accounted for as soon as the same can be ascertained; first deducting therefrom any expense which may necessarily have been incurred on account of such vessel in consequence of such desertion; and in settling the account of such wages or interest no allowance or deduction shall be made except for moneys actually paid, or goods at a fair price supplied, or expenses incurred to, or for such seaman or mariner, any receipt or voucher from, or arrangement with such seaman or mariner, to the contrary notwithstanding.

SEC. 26. *And be it further enacted*, That upon the application of any seaman or mariner for a discharge, if it shall appear to the consular officer that he is entitled to his discharge under any act of Congress, or according to the general principles or usages of maritime law, as recognized in the United States, he shall discharge such seaman or mariner, and shall require from the master or commander of the ship or vessel from which such discharge shall be made, the payment of three months' extra wages, as provided by the act hereinbefore mentioned, approved February twenty-eight, eighteen hundred and three; and it shall be the duty of

such master or commander to pay the same, and no such payment or any part thereof shall be remitted in any case, except such as are mentioned in the proviso of the ninth clause of the act, entitled "An act in addition to the several acts regulating the shipment and discharge of seamen and the duties of consuls," approved July twentieth, eighteen hundred and forty, and as hereinafter provided, and the extra wages required to be paid by the said ninth clause of the last hereinbefore mentioned act, and by this section, shall be applicable to the same purposes and in the same manner as is directed by the said act approved February twenty-eight, eighteen hundred and three, in regard to the extra wages required to be paid thereby; and if any consular officer, when discharging any seaman or mariner, shall neglect to require the payment of and collect the extra wages required to be paid in the case of the discharge of any seaman or mariner, by either of the said acts, as far as they shall remain in force under this act or by this act, he shall be accountable to the United States for the full amount of their share of such wages, and to such seaman or mariner to the full amount of his share thereof; and if any seaman or mariner shall, after his discharge, have incurred any expense for board or other necessaries at the port or place of his discharge before shipping again, such expense shall be paid out of the share of the three months' wages to which he shall be entitled, which shall be retained for that purpose, and the balance only paid over to him: *Provided, however*, That in cases of wrecked or stranded ships or vessels, or ships or vessels condemned as unfit for service, no payment of extra wages shall be required.

SEC. 27. *And be it further enacted*, That every consular officer shall keep a detailed list of all seamen and mariners shipped and discharged by him, specifying their names and the names of the vessels on and from which they shall be shipped and discharged, and the payments, if any, made on account of each so discharged, and also of the number of the vessels arrived and departed, and the amounts of their registered tonnage, and the number of their seamen and mariners, and of those who are protected, and whether citizens of the United States or not, and as nearly as possible the nature and value of their cargoes, and where produced, and make returns of the same, with their accounts and other returns, to the secretary of the treasury; and no consular officer shall certify any invoice unless he shall be satisfied that the person making the oath or affirmation thereto is the person he represents himself to be, that he is a credible person, and that the statements made under such oath or affirmation are true; and he shall, thereupon, by his certificate, state that he was so satisfied; and it shall be the duty of every consular officer to furnish to the secretary of the treasury, as often as shall be required, the prices current of all articles of merchandise usually exported to the United States from the port or place in which he shall be located.

SEC. 28. *And be it further enacted*, That it shall be the duty of every master and commander of a ship or vessel of the United States, whenever he shall have occasion for any consular or other official service, which any consular officer of the United States shall be authorized by law or usage officially to perform, and for which any fees shall be allowed by the said rates or tariffs of fees as aforesaid, to apply to such one of the said officers as may then be officially located at the consulate or commercial agency, if any there be where such service shall be required, to perform such service, and such master or commander shall pay to such officer such fees as shall be allowed for such service, in pursuance of the provisions of this act; and if any such master or commander shall omit so to do, he shall be liable to the United States for the amount of the fees lawfully chargeable for such services, as though the said services had been performed by such officer; and all consular officers are hereby authorized and required to retain in their possession all the papers of such ships and vessels, which shall be deposited with them as directed by law, till payment shall be made of all demands and wages on account of such ships and vessels.

AN ACT

TO PROVIDE FOR THE LICENSING AND GOVERNMENT OF THE PILOTS AND REGULATING PILOTAGE OF THE PORT OF NEW YORK,

Passed June 28, 1853.

EMBODYING THE AMENDMENTS,

Passed April 11, 1854, and April 4, 1857.

ALSO,

THE BY-LAWS OF THE BOARD OF COMMISSIONERS OF PILOTS FOR THE PORT OF NEW YORK.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. There shall be in the city of New York, a board entitled "The Board of Commissioners of Pilots," consisting of five persons, to be elected as soon as convenient after the passage of this act, and to hold their offices respectively for two years from the time of their election, and until others shall be elected.

SEC. 2. Three of such commissioners shall be elected by the members of the chamber of commerce of the city of New York, at a meeting to be called for the purpose, to be specified in the notice for the meeting, and the certificate of the secretary of that body, or other officer regularly performing his duties for the time being, shall be *primâ facie* evidence of such election.

SEC. 3. Two other of such commissioners shall be elected by the presidents and vice-presidents of the marine insurance companies of the city of New York, composing or represented in the board of underwriters of said city, at a regular convened meeting of such board, on the notice of their secretary, stating that the election of commissioners will take place, or of some member of the board by them duly authorized, given in writing, at least one day before the election, stating that the election of commissioners will take place, and delivered at the office of such company. Each insurance company represented at such meeting shall be entitled to one vote, and the certificate of the secretary of such board, or of any officer acting in his stead, shall be sufficient *primâ facie* evidence of an election.

SEC. 4. Upon the expiration of the term of office of any commissioner or commissioners, or within thirty days prior thereto, and upon any vacancy occurring by death, resignation, removal from the State, or other cause, another election for the term of two years shall be made by the same class of persons, or authority, as that which made the election to the office so expiring or becoming vacant.

SEC. 5. Each commissioner, before entering upon the duties of his office, shall take the usual oath of office before an officer authorized to administer oaths, which oath or affirmation shall be filed without delay in the office of the clerk of the city and county of New York.

SEC. 6. The commissioners shall appoint a secretary, who shall take a like oath, to be filed in like manner as provided in section five, and they may remove him at any time and appoint another, and shall prescribe his duties and compensation.

SEC. 7. The board shall establish an office in some convenient and proper place in the city of New York, where the commissioners shall meet on the first Tuesday of every month, and as much oftener by adjournment, or upon a notice given by any one of them, or by the secretary, as circumstances may require.

SEC. 8. The commissioners shall require their secretary in person, or by deputy, to be in daily attendance at their office on all ordinary business days, during the reasonable office hours, and shall cause to be kept by him a proper book or books, in which shall be written all the rules and regulations made by them, and all their official transactions and proceedings, and whatever else may be deemed by them proper and useful, and immediately pertaining to their duties or to the pilot service. They shall also cause to be kept, by their secretary, a register of the names and places of residence of all the pilots who may be licensed by virtue of this act, with the dates of their licenses respectively, and such books may be inspected by any person interested.

SEC. 9. The commissioners, or a majority of them, shall, with all convenient speed, proceed to license for such term as they may think proper, so many pilots as they may deem necessary for the port of New York; and such commissioners may specify in such licenses, different degrees of qualifications, appropriate to different parts or branches of duty, according to the competency of the applicant. No license shall be granted to any person holding any license or authority from or under the authority or laws of any other State; and the said commissioners, or a majority of them, shall have the power and authority to revoke and annul the license of any person so licensed by them to act as a pilot, who shall not be attached to a boat approved by said board, or who shall be guilty of any intoxication or other misconduct while on duty.

SEC. 10. It shall be the duty of the said commissioners, before they

shall grant a license to any person applying therefor, to act as a pilot in pursuance of this act, within one week thereafter, to call such applicant before them, and in presence of one or more of the pilots of the said port, licensed to pilot vessels to and from the said port by the way of Sandy Hook, who shall be notified to attend for the purpose, and who are hereby required to attend and assist in such examination; or in case of the non-attendance of the pilot or pilots who shall be so notified to attend for that purpose, then without the presence or assistance of any licensed pilot, to examine or cause to be examined, such applicant, touching his qualifications for the office of a pilot, and in particular touching his knowledge of the sailing and management of a square rigged vessel, and also touching his knowledge of the tides, soundings, bearing and distance of the several shoals, rocks, bars, and points of land, and night lights in the navigation for which he applies for a license to act as a pilot, and touching any other matter relating thereto, which the said commissioners may think proper. And if, upon examination, the person so applying shall be found to be of good moral character and temperate habits, and to be possessed of sufficient ability, skill, and experience to act as a pilot, and not otherwise, the said commissioners may grant him a license for piloting vessels to and from the port of New York by way of Sandy Hook.

Sec. 11. The commissioners, before granting licenses, shall require all pilots to enter into recognizance to the people of this State, with two sureties, to be approved by such commissioners, or a majority of them, each in a penalty not exceeding five hundred dollars, conditioned that the pilot shall diligently and faithfully perform his duties as pilot, and observe the rules and regulations and decisions of the board; and every such recognizance shall be prosecuted in the name of the people of the State of New York, by or in behalf of the commissioners, provided a majority of them shall so instruct, and if any amount be collected in such suit, it shall be paid to the said commissioners, and they may direct the same to be applied for purposes as expressed in section twenty-two.

Sec. 12. The said commissioners shall have the power to regulate the stationing of pilot boats, for the purpose of receiving pilots from outward bound vessels; and may alter or amend any existing regulations for pilots, and make and duly promulgate and enforce new rules or regulations, not inconsistent with the laws of this State or of the United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing such pilots. They may declare and enforce forfeitures of pilotage upon any mismanagement or neglect of duty by the pilots licensed by them; they may declare and impose and collect fines and penalties not exceeding two hundred and fifty dollars, for each offence; to prevent any of the pilots licensed by them from combining injuriously

with each other, or with other persons, and to prevent any person licensed by them from acting as a pilot during his suspension, or after his license may be revoked: and the said commissioners may establish and enforce all other needful rules and regulations for the conduct and government of the pilots licensed by them, and the parties employing them; and they may enforce and receive accounts of all moneys collected for pilotage, by the pilots licensed by them, and may impose and collect from such pilots a sum not exceeding three per cent. on the amount thereof, to defray their necessary expenses, including clerk hire and office rent.

Sec. 13. The fees for pilotage are hereby established as follows:

For every merchant vessel, inward bound, and not exempted from pilotage by virtue of these regulations, drawing less than fourteen feet of water, two dollars and forty-four cents per foot.

For every vessel drawing fourteen feet, and less than eighteen feet of water, three dollars and six and one-quarter cents per foot.

For every vessel drawing eighteen feet, and under twenty-one feet of water, three dollars and sixty-nine cents per foot.

For every vessel drawing twenty-one feet of water, and upwards, four dollars and thirty-one and a quarter cents per foot.

If the masters or owners of any vessel shall request the pilot to moor said vessel at any place within Sandy Hook, and not to be taken to the wharf or harbor of New York, or the vessel to be detained at quarantine, the same pilotage shall be allowed, and the pilot entitled to his discharge.

For piloting national armed vessels of the United States, and also those of foreign nations, five dollars per foot.

When any ship or vessel, bound to the port of New York, and boarded by any pilot appointed by this board, at such distance to the southward or eastward of Sandy Hook lighthouse, as that said lighthouse could not be seen from the deck of such ship or vessel in the daytime, and in fair weather, the addition of one fourth to the rates of pilotage herein before mentioned shall be allowed to such pilot.

Sec. 14. The pilotage on merchant vessels, outward, shall be as follows:

For every vessel drawing less than fourteen feet of water, one dollar and eighty-one cents per foot.

For every vessel drawing fourteen feet, and less than eighteen feet of water, two dollars and twelve and a half cents per foot.

For every vessel drawing eighteen feet, and less than twenty-one feet of water, two dollars and seventy-five cents per foot.

For every vessel drawing twenty-one feet and upwards, three dollars and eighteen and three fourth cents per foot.

Sec. 15. The rates of pilotage for any intermediate distance, shall be

determined by the board of commissioners, and promulgated in their rules and regulations for the government of pilots.

SEC. 16. Between the first day of November and the first day of April inclusive, four dollars shall be added to the full pilotage of every vessel coming into or going out of the port of New York.

SEC. 17. For every day of detention in the harbor of an outward bound vessel, after the services of a pilot have been required and given, except detention shall be caused by such adverse winds and weather that the vessel cannot get to sea; and for every day of detention of an inward bound vessel by ice longer than two days for passage from sea to wharf, three dollars shall be added to the pilotage. If any pilot shall be detained at quarantine, or elsewhere, by the health officer, for being or having been on board a sickly vessel, as pilot, the master, owner, or agent, or consignee of such vessel shall pay to such pilot all necessary expenses of living, and three dollars per day for each and every day of such detention.

SEC. 18. The pilotage shall be payable by the master, owner, consignee, or agent entering or clearing the vessel at the port of New York, who shall be jointly and severally liable therefor.

SEC. 19. A pilot who is carried to sea when a boat is attending to receive him, shall receive at the rate of one hundred dollars a month during his necessary absence.

SEC. 20. Masters of vessels shall give an account to the pilot when boarding, of the draught of such vessels, and in case the draught given is less than the actual draught, he shall forfeit the sum of twenty-five dollars, which may be sued for and recovered by the commissioners, as is hereinafter provided in section twenty-seven, in respect to other fines and penalties.

SEC. 21. For services rendered by pilots in moving or transporting vessels in the harbor of New York, the following shall be the fees:

For moving from North to East River, or *vice versa*, if a seventy-four gun ship, twenty dollars; if a sloop of war, ten dollars; if a merchant vessel, five dollars, except such vessel shall have arrived from sea, or is ready for and bound to sea, on the day such services for transportation are rendered; but if the services are rendered thereafter, such payment shall be made.

For moving any vessel from the quarantine to the city of New York, one quarter of the sum that would be due for the inward pilotage of such vessel.

For hauling any vessel from the river to a wharf, or from a wharf into the river, three dollars, except on the day of arrival or departure of such vessel.

SEC. 22. It shall be the duty of the commissioners, out of any funds

which may be obtained, to provide rewards, to encourage the prompt relief of disabled vessels, and the speedy report of the same, and generally to encourage not only the energetic performance of duty, but benevolent and praiseworthy efforts to relieve vessels and passengers from distress or suffering.

SEC. 23. The commissioners shall have power and authority, at any time, to suspend any pilot so licensed, for any period they may think proper, and also to revoke and annul any license which shall have been granted, upon satisfactory proof of negligence or carelessness on the part of such pilot, or of wilful dereliction of duty, or of wilful disobedience of any lawful rule or regulation duly made and promulgated by said commissioners; but the pilot or pilots so suspended may, at any time, upon due notice, appeal to the commissioners for a rehearing of their case; and the commissioners shall have power to confirm or reverse the previous act or decision of the said board.

SEC. 24. It shall be the duty of the commissioners to hear and examine all complaints duly made in writing against any pilot licensed by them, or against any person connected with a boat of such pilot, for any misbehavior or neglect of duty, or breach of their rules or regulations, that shall appear to them material to be investigated; and also all complaints made in like manner by any licensed pilot against any master, owner, or seaman of a vessel, for any misbehavior towards such pilot in the performance of his duty, or any breach of such rules or regulations.

SEC. 25. Before any person shall be proceeded against on any complaint, and before any pilot be suspended longer than for one month, or be removed, such person or pilot shall be notified in writing, signed by the secretary, to appear before the commissioners, specifying the nature and substance of such complaint, which notice shall be served personally, at least five days before the time fixed for appearance, and the commissioners, for just cause, shall postpone or adjourn the hearing from time to time; a certificate of such commissioners, or of a majority of them, with proof of such service or notice, shall be *primâ facie*, but not conclusive evidence that the party upon whom the notice was served, and a fine or penalty thereupon imposed, is liable to pay such fine or penalty.

SEC. 26. The secretary, under the supervision of the commissioners, shall, at the instance either of the complaining or defending party, issue subpœnas for compelling the attendance of witnesses to testify before the commissioners, in all cases in which the power to hear and examine is conferred by this act; and it shall be the duty of the commissioners to examine all such witnesses on oath, to be administered by them, as shall appear to them to give material testimony, and each person subpœnaed as a witness, shall be entitled to the like compensation from the party re-

quiring his attendance, and be subject to the like penalties and punishments for disobedience, or for false swearing, as in civil suit at law in the court of record.

SEC. 27. All pecuniary fines or penalties imposed by the said commissioners, by virtue of this act, may be sued for in the name of the "Board of Commissioners of Pilots," and the notice and certificate given as aforesaid, may be set forth in pleading, without setting forth other facts or circumstances. The decision of a majority of the commissioners shall be conclusive upon all questions arising under this act, except as herein before provided. In case of an omission to fill any vacancy in the board of commissioners for one month, the remaining two or three commissioners (as the case may be) shall have authority to perform all the duties of the commissioners for the time being.

SEC. 28. It shall be the duty of the secretary and his clerks, if any, when not employed under the foregoing provisions of this act, to aid the licensed pilots in keeping their accounts of pilotage, and in collecting the same, if desired, and in keeping a register of calls for pilots.

SEC. 29. No master of a vessel under three hundred tons burden, belonging to a citizen of the United States, and licensed and employed in the coasting trade by the way of Sandy Hook, shall be required to employ a licensed pilot, but in case the services of a pilot shall have been given, the pilot shall be entitled to the rates established. If the master of any vessel above three hundred tons burden, and owned by a citizen of the United States, and sailing under a coasting license to or from the port of New York by the way of Sandy Hook, shall be desirous of piloting his own vessel, he shall first obtain a license for such purpose from the commissioners of pilots, who are hereby authorized and required to grant the same, if such master shall, after an examination had by said commissioners, be deemed competent; which said license shall be and continue in force one year from the date thereof, or until the termination of any voyage, during which the license may expire. For such license, the master, to whom it shall be granted, shall pay to the said commissioners four cents per ton. All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot; or, in case of refusal to take such pilot, shall himself, owners, or consignees, pay the said pilotage as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel.

Any person not holding a license as pilot under this act, or under the laws of the State of New Jersey, who shall pilot or offer to pilot any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this act, or any master or person

on board a steam tug or tow boat, who shall tow such vessel or vessels, without such licensed pilot on board such vessel or vessels, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the board of commissioners of pilots the sum of one hundred dollars.

The provisions of this act shall not apply to vessels propelled wholly or in part by steam, owned or belonging to citizens of the United States, and licensed and engaged in the coasting trade.

Sec. 30. This act shall not repeal, or in any way affect, the provisions of an act entitled "An act concerning the pilots of the channel of the East River, commonly called 'Hell Gate,'" passed April 15, 1847.

Sec. 31. All laws now in force, and which are inconsistent with the provisions of this act, are hereby repealed.

April 24, 1857.

BY-LAWS.

1st. The officers of the board shall be a president and secretary, to be chosen annually on the first Tuesday in August.

2d. The president shall preside at the meetings of the board, and his duties shall be to conduct the examination of candidates for the office of pilot, sign licenses when granted, and exercise a general supervision over the office. In the absence of the president, a chairman *pro tem.* shall be appointed, whose duties shall be the same.

3d. The duties of the secretary shall be as provided for in sections 8 and 28.

4th. The meetings shall be as provided for in section 7.

5th. The charge for licenses shall be one dollar for the first issue, and twenty-five cents for renewal.

6th. The pilots shall pay two and a half per cent. on the gross amount of pilotage, which sum shall be paid to the secretary of the board within one month from the time said pilotage was earned — and any pilot not so paying shall forfeit his license.

7th. The pilots shall report to the secretary, either verbally or in writing, as soon as practicable, all vessels piloted by them, with the amount received for their services, under a penalty of ten dollars for each offence.

8th. The boats shall keep station at or near the Hook, alternately, for four days each, and in accordance with a list to be made out by the sec-

retary. When on station the boat shall have a conspicuous signal at the masthead. It shall be the duty of the boat on station to render every necessary aid for taking out and receiving pilots from outward bound vessels, and give every facility for sending said pilots to the city of New York or quarantine.

In case a pilot is carried off to sea in consequence of the non-attendance of the station boat, except by unavoidable accident, the company of said boat shall pay to him at the rate of one hundred dollars per month during his necessary absence.

The boat on station shall remain until relieved; and any boat not being in time to take her station, shall pay to the boat not relieved twenty-five dollars per day, and shall likewise have added to her station the time she is absent.

SIGNAL — Jack at the foremast head.

9th. All boats shall have conspicuous numbers in their sails — said numbers to be designated by the commissioners.

10th. No pilot shall, by any unfair means, take a vessel from another pilot.

11th. No boat shall put a boy or other person than a licensed pilot on board a vessel, for the purpose of piloting said vessel, under a penalty of fifty dollars and the amount of pilotage — said sum to be paid by the owners of the boat to the commissioners, and to be applied as directed in section 22. This shall not apply to vessels in distress, providing the masters of such vessels are willing to employ the services of such boy or person.

12th. All matters in relation to apprentices shall be left to the commissioners, both as to their number, time of service, &c., &c.

13th. There shall be a register kept in the office of all boat keepers. Boat keepers serving the longest time in one boat shall, when an appointment is to be made, have the preference — said time not to be less than three years. Any boat keeper leaving one boat and going to another, without good and sufficient cause, shall lose all the privileges he may have of becoming a pilot.

14th. The names of all persons applying for license to pilot, shall be posted up in some conspicuous place in the office of the commissioners, at least thirty days before any examination shall be had. And any person having any complaint to make against an applicant, shall make the same in writing, giving his reasons therefor, the same to be open to inspection.

15th. Pilots are required to board the nearest vessel having a signal flying for a pilot, except in case there should be a vessel in sight with a signal of distress, under a penalty of fifty dollars.

16th. Every licensed pilot shall be attached to a pilot boat; no pilot shall remain unattached for more than thirty days, without permission from the commissioners. Any pilot neglecting or refusing to join a pilot

boat within ten days after due notice shall have been given him to join a boat, shall, unless satisfactory reasons are given for the non-compliance of the order, be fined the sum of ten dollars, or be suspended for such time as the commissioners shall deem proper, or have their licenses revoked, at the option of the commissioners.

17th. Pilots are required to transport a vessel to any part of the port of New York, when applied to, under a penalty of twenty-five dollars, such service to be paid for as per section 21 of the law.

18th. No master of a pilot boat shall carry to sea on her station, or be in any way aiding or assisting in putting on board any ship or vessel, for the purpose of piloting or conducting her, any person not licensed, or whose license, as a pilot, shall have been suspended or withdrawn by the commissioners, or shall not have been renewed. If any such person shall be received on board a pilot boat, the pilot or pilots receiving him on board shall, for every offence, forfeit and pay the sum of twenty-five dollars each; and for a second or subsequent offence, the pilot or pilots shall be liable to suspension or forfeiture of his or their license or licenses, at the discretion of the commissioners.

19th. The pilotage ground of the port of New York shall be deemed to be west of a line drawn in the shortest direction from Fire Island light to that of Barnegat light, which line will run S. W. $\frac{1}{4}$ S., and N. E. $\frac{1}{4}$ N., and that west of that line vessels subject to pilotage must take the first pilot offering his services, or pay the pilotage.

20th. A pilot, whilst on his business as a pilot, found guilty of using abusive or insulting language, or guilty of threatening conduct, shall be suspended, or have his license revoked, as the commissioners may adjudge.

21st. Pilotage for taking vessels from the old to the new quarantine:

For vessels having had death or sickness on board, double outward pilotage.

For vessels from sickly ports, but having had no sickness on board, single outward pilotage.

Pilotage of vessels from new quarantine to New York, half inward pilotage.

22d. Vessels from sea, boarded inside of the outer buoy of the Bar, and any intermediate distance below the narrows shall pay half pilotage. If boarded above the narrows, one quarter pilotage.

This section has no reference to section 21.

23d. No pilotage except the regular inward pilotage shall be allowed when vessels are detained from the non-visiting of the health officer.

RATES OF PILOTAGE FROM APRIL 1st TO NOVEMBER 1st.

Inward.					Outward.	Inward.					Outward.
			Off shore.	Total.					Off shore.	Total.	
6 ft.	0 in.	$14 64	$3 66	$18 30	$10 86	16 ft.	0 in.	$49 00	$12 25	$61 25	$34 00
6	6	15 86	3 96	19 82	11 76	16	6	50 53	12 63	63 16	35 06
7	0	17 08	4 27	21 35	12 67	17	0	52 06	13 01	65 07	36 12
7	6	18 30	4 57	22 87	13 58	17	6	53 59	13 40	66 99	37 19
8	0	19 52	4 88	24 40	14 48	18	0	66 42	16 60	83 02	49 50
8	6	20 74	5 18	25 92	15 38	18	6	68 26	17 06	85 32	50 88
9	0	21 96	5 49	27 45	16 29	19	0	70 11	17 53	87 64	52 25
9	6	23 18	5 79	28 97	17 19	19	6	71 95	17 99	89 94	53 62
10	0	24 40	6 10	30 50	18 10	20	0	73 80	18 45	92 25	55 00
10	6	25 62	6 40	32 02	19 00	20	6	75 64	18 91	94 55	56 37
11	0	26 84	6 71	33 55	19 91	21	0	90 56	22 64	113 20	66 94
11	6	28 06	7 01	35 07	20 80	21	6	92 72	23 18	115 90	68 53
12	0	29 28	7 32	36 60	21 72	22	0	94 87	23 72	118 59	70 12
12	6	30 50	7 62	38 12	22 62	22	6	97 03	24 26	121 29	71 71
13	0	31 72	7 93	39 65	23 53	23	0	99 19	24 80	123 99	73 31
13	6	32 94	8 23	41 17	24 44	23	6	101 34	25 33	126 67	74 90
14	0	42 88	10 72	53 60	29 75	24	0	103 50	25 87	129 37	76 50
14	6	44 41	11 10	55 51	30 81	24	6	105 66	26 41	132 07	78 09
15	0	45 94	11 48	57 42	31 88	25	0	107 81	26 95	134 76	79 69
15	6	47 47	11 87	59 34	32 94						

RATES OF PILOTAGE FROM NOVEMBER 1st TO APRIL 1st.

Inward.					Outward.	Inward.					Outward.
			Off shore.	Total.					Off shore.	Total.	
6 ft.	0 in.	$18 64	$3 66	$22 30	$14 86	16 ft.	0 in.	$53 00	$12 25	$65 25	$38 00
6	6	19 86	3 96	23 82	15 76	16	6	54 53	12 63	67 16	39 06
7	0	21 08	4 27	25 35	16 67	17	0	56 06	13 01	69 07	40 12
7	6	22 30	4 57	26 87	17 58	17	6	57 59	13 40	70 99	41 19
8	0	23 52	4 88	28 40	18 48	18	0	70 42	16 60	87 02	53 50
8	6	24 74	5 18	29 92	19 38	18	6	72 26	17 06	89 32	54 88
9	0	25 96	5 49	31 45	20 29	19	0	74 11	17 53	91 64	56 25
9	6	27 18	5 79	32 97	21 19	19	6	75 95	17 99	93 94	57 62
10	0	28 40	6 10	34 50	22 10	20	0	77 80	18 45	96 25	59 00
10	6	29 62	6 40	36 02	23 00	20	6	79 64	18 91	98 55	60 37
11	0	30 84	6 71	37 55	23 91	21	0	94 56	22 64	117 20	70 94
11	6	32 06	7 01	39 07	24 80	21	6	96 72	23 18	119 90	72 53
12	0	33 28	7 32	40 60	25 72	22	0	98 87	23 72	122 59	74 12
12	6	34 50	7 62	42 12	26 62	22	6	101 03	24 26	125 29	75 71
13	0	35 72	7 93	43 65	27 53	23	0	103 19	24 80	127 99	77 31
13	6	36 94	8 23	45 17	28 44	23	6	105 34	25 33	130 67	78 90
14	0	46 88	10 72	57 60	33 75	24	0	107 50	25 87	133 37	80 50
14	6	48 41	11 10	59 51	34 81	24	6	109 66	26 41	136 07	82 09
15	0	49 94	11 48	61 42	35 88	25	0	111 81	26 95	138 76	83 69
15	6	51 47	11 87	63 34	36 94						

All national armed vessels, $5 per foot inward and outward, with off shore, if so boarded, and winter charge.

TRANSPORTATION NORTH TO EAST RIVER, AND VICE VERSA.

A seventy-four gun ship	$20	A sloop of war	$10
A frigate	15	All Merchant vessels	5

Pilotage from Quarantine one quarter of the inward pilotage, exclusive of off-shore.

Hauling to or from the wharf, $3. Detention, $3 per day.

GENERAL REGULATIONS

FOR PILOTAGE IN THE COMMONWEALTH OF MASSACHUSETTS.

The following are the Rules and Regulations for Pilotage in the State of Massachusetts, Reported by the Commissioners of Pilots, and Approved by the Governor and Council: —

1. No person not holding a commission as pilot (excepting those actually employed on board of the vessel for the voyage), shall in any case exercise the duties of a pilot on board of any vessel within the waters of this Commonwealth, whether said vessel is liable to compulsory pilotage or not, provided a commissioned pilot offers his services, or can be obtained at a reasonable time, under a penalty of not less than twenty, and not exceeding fifty dollars for each and every offence. All commissions shall be revocable at the pleasure of the commissioners.

2. If at any time the bond of any pilot shall appear to be insufficient, a new one will be required by the commissioners.

3. No vessel shall be liable to pilotage in or out of any port other than her ports of departure and destination. But if the aid of a pilot be required, the pilot shall be bound to do the duty, and entitled to the regular compensation therefor.

4. Every vessel inward bound, excepting the vessels provided for in section nineteenth, shall receive the first pilot holding a commission, for her port of destination that may offer his services, and shall be holden to pay to such pilot, the regular fees for pilotage, whether his services be accepted or not. Outward bound vessels in all cases are requested to give a preference to the pilot, who may have brought said vessel into port, or to a pilot from the same boat.

5. It shall be the duty of every pilot to first board vessels (irrespective of size) having signals set for a pilot. When there are no signals to be seen, then the pilots are to offer their services to the first vessel which they can board; and in case any vessel liable to pilotage should refuse to take a pilot, it shall be the duty of the pilot to inform said vessel that she will be holden to pay the regular fees for pilotage, whether his services are accepted or not.

6. Every pilot shall exhibit his commission when required, to the master of any vessel of which he may take charge.

7. No pilot shall take charge of any vessel drawing more water than his commission authorizes, under penalty of suspension or dismission.

8. Every pilot shall be liable, together with his bondsmen, for all damages that may accrue from his negligence, unskilfulness, or unfaithfulness.

9. Every pilot shall make out and forward to the commissioners his quarterly return, within the first fifteen days of October, January, April, and July; any neglect of said returns and the settlement thereof, will be ground for suspension or dismission.

10. The period during which winter rates of pilotage shall be allowed, shall be uniformly from November 1 to April 30 inclusive; summer rates from May 1 to October 31 inclusive, for all the ports of the Commonwealth.

11. The hull and appurtenances of every vessel shall be liable for all legal claims on account of pilotage, either rendered or offered, for the space of sixty days.

12. All pilots shall anchor vessels carrying alien passengers, or vessels subject to quarantine at the places assigned for such purpose by the proper authorities, under penalty of suspension or dismission, as well as of the fines by law provided for neglect thereof.

13. All disputes between pilots in relation to their rights, privileges, and duties with each other, shall be referred to, and settled by three master pilots, to be chosen by the parties for that purpose, to be adjusted and settled according to the regulations and the laws, subject, nevertheless, to reversal or modification by the commissioners.

14. Whenever any vessel shall be anchored under the regulations for quarantine, or alien passengers, for twelve hours or over, the pilot in charge shall be entitled to twenty-five per cent. in addition to the ordinary fees, by afterwards piloting the vessel to her port of destination.

15. Any pilot who shall be unable to leave a vessel under his charge and be carried to sea, without any negligence or fault of his own, or his associates, shall be entitled to two dollars per day, while necessarily absent from home.

16. All passenger steam vessels, regulated by the laws of the United States, and carrying a pilot commissioned by United States commissioners, are exempt from the compulsory payment of pilotage.

17. All national vessels, both inward and outward, shall pay in all ports in the Commonwealth when they shall employ a pilot, four dollars per foot for fifteen feet or less draught of water, and five dollars per foot for over fifteen feet draught of water.

18. Every regularly appointed pilot is authorized and directed to take charge of any vessels within the limits of his commission, except fishing

vessels (not including whaling vessels), all single-decked vessels of three hundred and fifty tons or under, sailing under a coasting license, and all other vessels bound from a port within this State, to another port within this State, unless such vessel shall be in the completion of a voyage from a port or place without the State, and steam vessels as per regulation, No. 17.[1]

19. Vessels of two hundred tons burden and under and liable to pay pilotage, declining the services of a pilot, shall henceforth be liable only for one half of the regular pilotage fees. And, also, vessels of less than seven feet draught of water shall be exempt from compulsory pilotage, in all ports in the Commonwealth.

20. The regulations and rates of pilotage, for all ports, not named in the following port regulations, shall be such as the commissioners may prescribe.

21. It shall be the duty of all pilots to give immediate information to the pilot commissioners, of the decease or insolvency of any person who may be surety on their bond, under a penalty of two hundred dollars.

22. The statute of 1855, chapter 421, section 5, provides that in all cases, six per cent. upon the amount of all pilotage fees shall be collected by pilots and paid over to the commissioners. Pilots and masters or agents of vessels will govern themselves accordingly.

REGULATIONS

FOR THE PILOTAGE OF THE HARBOR OF BOSTON, AND ALL PLACES OR LANDINGS ACCESSIBLE TO VESSELS FROM SEA, INCLUDED WITHIN THE LIMITS OF NAHANT ROCK ON THE NORTH, AND POINT ALDERTON ON THE SOUTH.

There shall be not less than six pilot boats constantly employed by the Boston pilots; each boat shall have a number, which shall be painted in black figures of not less than forty-eight inches in length, in the mainsail and jib; the numbers of boats and crews of said boats to be regulated by the commissioners.

Each boat shall have a first and second master, who are required to see that all the pilot regulations are strictly conformed to; any non-performance of duty, or insubordination on the part of any pilot, upon the complaint of any master, will receive prompt investigation by the commissioners.

Each one of the pilot boats employed for the harbor of Boston, in

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[1] The regulation referred to should be No. 16, which was numbered 17 in the old rules.

alternate weeks, and in the order of their numbers, commencing with No. 1 on Monday, 13th December, 1858, at 12 o'clock, noon; shall cruise on a station at the entrance of Boston harbor, outside of Boston light, and within the limits of a line drawn from Minot's Ledge to Nahant Head; and the boat on said station shall at all times show the established pilot boat signal, and shall by day and by night, at all times, remain on said station whenever the weather does not render it impracticable, and be on the lookout for vessels approaching Boston harbor, and shall at all times be furnished with pilots without leaving her station, and shall offer the services of a pilot to all vessels entering said harbor in accordance with the fifth general regulation, and she shall receive on board pilots from outward bound vessels, and render to them all the facilities for their return to the city of Boston, which is consistent with their duty. The station boat shall not leave said station until relieved by another boat, and if the boat next in turn for said station shall at any time be unnecessarily absent from said station, the pilots on board of said boat at the time shall collectively be liable to a penalty not exceeding two hundred dollars, the amount and apportionment of which shall be decided by the commissioners, and the pilot or pilots so offending shall be liable to immediate suspension or dismissal from the pilot service at the discretion of the commissioners, but in case of accident or casualty rendering it impossible for said boat to be on her station, the fact shall be immediately reported to the commissioners, who may order any other boat to take said station, and remain until relieved, said boat being subject to the same liabilities after receiving said order, as though it was her regular turn. In case of a want of pilots at any time on board of the station boat to supply the demand of inward bound vessels, pilots taken on board from outward bound vessels may with the consent of the master of the station boat go on board of inward bound vessels, but no pilot shall board an inward bound vessel except from the boat to which he belongs without such permission.

It shall be the duty of every pilot, after having brought a vessel to the inner harbor of Boston, to have such vessel properly moored in the stream, or secured to a wharf (below the bridges), at the option of the master, within twenty-four hours after arrival, weather and tide permitting, without extra charge.

If any vessel outward bound, having a pilot on board, should anchor in Nantasket Roads, it shall be the duty of the pilot to remain on board said vessel, if requested by the master, until the next high-water, and if detained after that time, he shall be entitled to receive three dollars per day for each and every day so detained.

No pilot shall leave a vessel outward bound, until to the eastward of George's Island, without permission of the master of said vessel.

Every pilot is required to perform his full share of the duties of an inward, as well as outward pilot, unless prevented by sickness, or causes satisfactory to the commissioners.

RATES OF PILOTAGE OUTWARD, FOR THE PORT OF BOSTON.

From November 1 to April 30, inclusive.			From May 1 to October 31, inclusive.		
7 feet	per foot	95 cts.	7 feet	per foot	80 cts.
8 "	"	95	8 "	"	80
9 "	"	$1 00	9 "	"	85
10 "	"	1 00	10 "	"	90
11 "	"	1 05	11 "	"	95
12 "	"	1 10	12 "	"	$1 00
13 "	"	1 15	13 "	"	1 05
14 "	"	1 20	14 "	"	1 10
15 "	"	1 25	15 "	"	1 15
16 "	"	1 30	16 "	"	1 20
17 "	"	1 35	17 "	"	1 25
18 "	"	1 45	18 "	"	1 30
19 "	"	1 50	19 "	"	1 35
20 "	"	1 60	20 "	"	1 50
21 "	"	2 00	21 "	"	1 75
22 "	"	2 50	22 "	"	2 00
23 "	"	3 00	23 "	"	2 50
24 "	"	4 25	24 "	"	3 50
25 "	"	5 00	25 "	"	4 00

All national vessels of 15 feet or less draught of water, $4 per foot.
" " " over 15 " " " $5 "

RATES OF PILOTAGE INWARD, FOR THE PORT OF BOSTON.

From November 1 to April 30, inclusive.			From May 1 to October 31, inclusive.		
7 feet	per foot	$1 50	7 feet	per foot	$1 20
8 "	"	1 50	8 "	"	1 20
9 "	"	1 55	9 "	"	1 30
10 "	"	1 60	10 "	"	1 35
11 "	"	1 75	11 "	"	1 40
12 "	"	1 80	12 "	"	1 45
13 "	"	1 85	13 "	"	1 50
14 "	"	1 90	14 "	"	1 55
15 "	"	2 00	15 "	"	1 65
16 "	"	2 10	16 "	"	1 75
17 "	"	2 20	17 "	"	1 90
18 "	"	2 50	18 "	"	2 00
19 "	"	2 90	19 "	"	2 10
20 "	"	3 25	20 "	"	2 30
21 "	"	3 80	21 "	"	2 75
22 "	"	4 20	22 "	"	3 00
23 "	"	4 50	23 "	"	3 50
24 "	"	5 00	24 "	"	4 00
25 "	"	5 00	25 "	"	4 50

All national vessels of 15 feet or less draught of water, $4 per foot.
" " " over 15 " " " $5 "

Any commissioned pilot that shall offer his services to any vessel bound into the harbor of Boston, without or eastward of a line drawn from Monument Land, Plymouth, to Thatcher's Island, Cape Ann, from the first day of November to the thirtieth day of April inclusive, shall be entitled to receive twenty per cent. in addition to the foregoing rates.

The fees for hauling a vessel from the stream to a wharf (below the bridges), after the expiration of twenty-four hours from arrival, shall be four dollars; and for hauling a vessel from the wharf to the stream, provided the vessel does not proceed to sea within twenty-four hours from the time of anchoring, four dollars.

If any commissioned pilot offers himself to any inward bound vessel liable to take a pilot, outside of a line drawn from Harding's Rocks to the Graves and Bass Point, and the master of the vessel should refuse to take such pilot on board, the master or owner of such vessel or either of them, shall be liable to such pilot for the regular pilotage, as if his services had been accepted.

Not less than three pilot boats shall at all times cruise in Boston Bay outside of the limits prescribed for the station-boat.

Every commissioned pilot for Boston Bay shall be attached to a pilot boat, and no pilot shall remain unattached for more than thirty days, without permission from the commissioners. Any pilot neglecting or refusing to join a pilot boat for ten days after being duly notified to join one, unless satisfactory reasons are given for noncompliance shall be liable to suspension, or to have his commission revoked at the option of the commissioners.

No pilot shall take charge of any vessel of a larger draught of water than his commission authorizes, nor shall any other person, not having a commission, be put on board of any vessel from either of the pilot boats, in the capacity of pilot. But in the event of the master of any vessel taking on board an unauthorized person to assist him in going into port, the person so taken shall state the circumstances to the master of said vessel, and keep the usual signal flying for a pilot until within a line from the Harding's Rocks to the Graves and Bass Point, and shall give the vessel up to any authorized pilot who may offer himself.

Any vessel inward bound, requiring the services of a pilot when inside of a line drawn from Boston Light-house to Point Alderton in the Light-house Channel, or when abreast of or inside of the outer Brewster Island, in Broad Sound, shall be liable only to two thirds of the established rates of pilotage, and if outward bound from Nantasket or President Roads, half pilotage rates only.

Any commissioned pilot for the harbor of Boston, that may be found mating or combining, or in any way interested with any other pilot in the business of pilotage, except with those pilots belonging to the same boat with himself, shall be liable to forfeit his commission.

The established pilot signal by day, is a white and blue flag, white next to the mast, and in the night a red light.

In the division of earnings of any pilot boat among the crew, the following allowance shall be made to those pilots holding a commission for a limited draught of water: —

For a commission for 10 feet draught of water $\frac{1}{3}$ of a share.
" " 12 " " " $\frac{1}{2}$ " "
" " 14 " " " $\frac{2}{3}$ " "
" " 16 " " " $\frac{3}{4}$ " "

The pilots of the port of Boston shall have an office, or keep a desk in some counting-room in some central situation, where all communications may be left for them, and it shall be the duty of the pilots when in Boston, to call at said office or desk, twice a day at least.

REGULATIONS

FOR THE PILOTAGE OF NANTUCKET SHOALS, VINEYARD SOUND, AND PORTS BORDERING THEREON, AND ALSO FOR BUZZARD'S BAY AND HARBORS BORDERING ON ITS WATERS.

The rates for piloting vessels through the Vineyard Sound over Nantucket Shoals into Boston Bay, or to any port of destination eastward thereof, if the pilot be taken westward of a line drawn due south from Tarpaulin Cove Light-house, or between said line and a line drawn from Noman's Land to Saugkonnet Point, from the first day of November to the thirtieth day of April inclusive, shall be for vessels not drawing more than eleven feet of water, three dollars and fifty cents per foot; if drawing more than eleven feet of water and not more than fourteen feet, four dollars per foot; if drawing more than fourteen feet, four dollars and fifty cents per foot. And from the first day of May to the thirty-first day of October inclusive, for vessels drawing not more than eleven feet of water, two dollars and fifty cents per foot. If drawing more than eleven feet and not more than fourteen feet, three dollars per foot. If drawing more than fourteen feet, three dollars and fifty cents per foot. And if the pilot be taken west of said line, drawn from Saugkonnet Point to Noman's Land, ten per cent. shall be added to the above specified rates; and if said pilot be taken at any point east of said line, drawn due south from Tarpaulin Cove Light-house, ten per cent. shall be deducted from said rates; and if, during the navigation aforesaid, the pilot is detained in any port at the request of the master, commander, or owner of said vessel, and not from stress of weather, he shall be allowed three dollars per day for all such detention; and in all cases five dollars shall be added to the rates aforesaid, if the vessel shall be taken to a port of destination east of Cape Ann, and not eastward of Portsmouth, and if the port of destination be Portsmouth, or eastward thereof, ten dollars shall be added to said rates; provided, however, that any other rates may be agreed upon, by written contract between the master, commander, or owner of any vessel to be piloted, and the pilot taking charge of the vessel.

The rates for piloting from west of a line drawn from Saugkonnet

Point to Noman's Land, to the ports herein named, shall be as follows, namely: Into Tarpaulin Cove, one dollar and fifty cents per foot, Wood's Hole, Falmouth Port, and Holmes' Hole, one dollar and seventy-five cents per foot. Into Edgartown and Hyannis, two dollars per foot; and to the Bar of Nantucket harbor, two dollars and twenty-five cents per foot. And into any other ports on the south coast of Barnstable county or on the Vineyard Sound, one dollar and seventy-five cents per foot.

The outward rates of pilotage from all the above-named ports and from the Bar of Nantucket harbor, if taken westward past Gay Head, shall be three fourths of the above, and the outward and inward rates shall be increased by twenty per cent. for all piloting done between the first day of November and the thirtieth day of April inclusive.

The rates for piloting vessels into any of the above-named ports, and to the Bar of Nantucket harbor, from any point east of a line drawn from Saugkonnet Point to Noman's Land, and between said line and a line drawn due south from Tarpaulin Cove Light-house, shall be twenty-five per cent. less than the above-named rates; and if said pilot is taken east of a line drawn due south from Tarpaulin Cove Light-house, fifty per cent. shall be deducted from said specified rates; and in case the master then declines taking a pilot, said pilot offering shall be entitled to one quarter pilotage, agreeably to these regulations; and if no pilot shall have offered his services before passing a line drawn from the West Chop Light-house to the Nobska Light-house, there shall be no obligation on the part of the master or owner to pay pilotage, if the master shall then decline receiving a pilot.

The rates of pilotage for vessels coming from the eastward bound to the aforesaid ports, shall be from east of a line drawn due north from Nantucket Great Point Light-house to the Bar of Nantucket, one dollar and fifty cents per foot of said vessel's draught. Into Edgartown and Hyannis, one dollar and seventy-five cents per foot. Into Holmes' Hole, Falmouth Port, and Wood's Hole, two dollars per foot; and into all other ports on the south coast of Barnstable county or on the Vineyard Sound, one dollar and seventy-five cents per foot; and from west of said line drawn due north from Great Point Light-house, twenty-five per cent. less than the foregoing. The outward rates, when passing to sea to eastward of Nantucket Shoals, shall be three fourths of the inward rates, and both outward and inward rates shall be increased by twenty-five per cent. for all pilotage done between the first of November and the thirtieth of April, inclusive.

The rates of pilotage from one port to another on the Vineyard Sound, including the south coast of Barnstable county, and from the said ports to the Bar of Nantucket harbor, and *vice versa*, shall be uniformly one dollar and twenty-five cents per foot, and twenty-five per cent. additional

for all pilotage done between the first day of November and the thirtieth day of April, inclusive. And for pilotage inward or outward over the Bar of Nantucket harbor only, at all seasons of the year, one dollar per foot.

Any person holding a commission as pilot for Nantucket Shoals, is authorized to pilot vessels from any part of the Vineyard Sound, Nantucket Shoals, and ports bordering on the waters of the same, to the harbor pilots' limits of any port in Buzzard's Bay or ports west of said bay, at the following rates of pilotage: From any point east of a line drawn due north from Cape Poge, at two dollars per foot of such vessel's draught, and if taken westward of said line, drawn due north from Cape Poge, one dollar and fifty cents per foot; and if no port pilot offers his services, with the consent of the master, they may proceed with said vessel to her destination, and claim the whole amount of pilotage. Provided, however, that no vessel passing through the waters of the Vineyard Sound, or over the Nantucket Shoals to ports beyond them, shall be holden to pay compulsor pilotage. But in no case shall an unauthorized pilot take charge of any vessel when a commissioned pilot can be obtained at a proper time. Pilots holding commissions for Vineyard Sound and Nantucket Shoals, who may have piloted a vessel over said shoals, whose destination is a port in Barnstable or Boston Bay, or eastward thereof, on arrival at the port of her destination, and no harbor pilot offering his services, may with the consent of the master (but not otherwise) pilot such vessel into her port of destination, and receive the regular port pilot fees therefor.

Pilots especially commissioned for the purpose, shall be authorized to pilot vessels from sea, which are bound into the ports of New Bedford and Fairhaven to abreast of Clark's Point Light-house, and to the port pilot limits of other ports in Buzzard's Bay (or westward thereof), and if no port pilot offers his services, they may, with the consent of the master or owner, proceed with such vessel to her port of destination, and claim the full amount of pilotage.

The rates of pilotage from sea for vessels bound into the ports of New Bedford and Fairhaven to abreast of Clark's Point Light-house, shall be one dollar and ninety cents per foot, and from abreast of Clark's Point Light-house to the inner harbors of New Bedford and Fairhaven, thirty-five cents per foot, and twenty per cent. additional to the sea or bay pilotage, from the first day of November to the thirtieth day of April, when a pilot offers his services or is taken west of a line drawn from Saugkonnet Point to the south point of Noman's Land.

The outward rates of pilotage, from the ports of New Bedford and Fairhaven, to abreast of Clark's Point Light-house, shall be thirty-five cents per foot from abreast of Clark's Point Light-house, to sea, one dollar and fifty cents per foot.

Vessels bound into other ports (than New Bedford and Fairhaven) in Buzzard's Bay, and ports west of said bay, are exempt from paying compulsory bay pilotage, when coming from sea from westward to the port pilot limits of the several ports, but if a pilot is employed, he shall be entitled to receive two dollars per foot, and if no port pilot offers his services, he may, with the consent of the master or owner, conduct said vessel to the port of her destination, and claim the whole amount of pilotage.

The rates of port or harbor pilotage for all the different ports bordering on Buzzard's Bay, and to the westward thereof, excepting New Bedford and Fairhaven, shall be for vessels inward bound drawing less than twelve feet of water, one dollar per foot, for those drawing from twelve to fifteen feet of water inclusive, one dollar and thirty cents per foot, for those drawing more than fifteen, and not more than eighteen feet of water, two dollars per foot, and for those drawing over eighteen feet of water, two dollars and fifty cents per foot, and the rates of pilotage for vessels outward bound from said ports, shall be three quarters of said inward rates, and both outward and inward rates shall be increased by twenty per cent. for all pilotage done between the first day of November and the thirtieth day of April inclusive.

REGULATIONS AND FEES

OF PILOTAGE, APPLICABLE TO THE FOLLOWING HARBORS, NAMELY: PROVINCETOWN, PLYMOUTH, NEWBURYPORT, GLOUCESTER, ROCKPORT, LANE'S COVE, ANNISQUAM, SALEM AND BEVERLY, MARBLEHEAD, TAUNTON RIVER, AND MERRIMACK RIVER AND HARBORS, DORCHESTER AND NEPONSET, HINGHAM, WEYMOUTH AND QUINCY, LYNN, MYSTIC AND CHARLES RIVERS.

PROVINCETOWN.

The rates of pilotage, for all vessels liable to pay pilotage, bound into the harbor of Provincetown, if taken south of a line drawn due west from Race Point Light-house, or between that and a line drawn due south from Wood End Bar, shall be for vessels drawing less than twelve feet of water, one dollar per foot, for those drawing from twelve to fifteen feet of water, inclusive, one dollar and thirty cents per foot, for those drawing more than fifteen feet, and not more than eighteen feet of water, two dollars per foot, for those drawing more than eighteen feet and not more than twenty-one feet of water, two dollars and fifty cents per foot, for those drawing more than twenty-one feet, and not more than twenty-five feet of water, three dollars and fifty cents per foot, and no more. But no vessel shall be liable to pay compulsory pilotage, if the services of a pilot are refused after passing a line drawn due south from Wood End

Bar. And the outward rates of pilotage shall be three fourths the amount of said inward rates.

PLYMOUTH.

The rates of pilotage for vessels liable to pay pilotage bound into the harbor of Plymouth, shall be one dollar per foot. Vessels arriving inside of the Gurnet, and no pilot previously offering his services, are exempt from compulsory pilotage, if a pilot's services are then refused. Rate of pilotage outward seventy-five cents per foot.

NEWBURYPORT.

The rates of pilotage for vessels liable to pay pilotage bound into or out of the harbor of Newburyport, shall be for outward bound vessels, from seven to twelve feet draught of water, sixty-five cents per foot; from twelve to fifteen feet, inclusive, eighty-five cents per foot; upwards of fifteen feet, one dollar and five cents per foot. The summer rates of pilotage for inward bound vessels drawing from seven to under twelve feet, ninety-five cents per foot; from twelve to fifteen feet inclusive, one dollar and twenty-five cents per foot; over fifteen feet, one dollar and sixty cents per foot. The winter rates of pilotage for inward bound vessels drawing from seven to twelve feet of water, one dollar and twenty-five cents per foot; from twelve to fifteen feet, inclusive, one dollar and sixty-five cents per foot; over fifteen feet, two dollars and ten cents per foot.

The district limits of the port of Newburyport, shall be from Chebacco Bar on the south, to the Isle of Shoals on the north. Vessels not spoken until within the bar, shall pay only half pilotage; if not spoken until and within the Black Rocks, shall pay no compulsory pilotage.

The pilots of Newburyport will be required to keep one or more good decked boats, and one boat shall be upon the cruising ground at all times when the weather will permit.

ROCKPORT, LANE'S COVE, AND ANNISQUAM.

The rates of pilotage shall be for vessels under twelve feet draught of water, seventy-five cents per foot; of twelve to fifteen feet inclusive, one dollar per foot; over fifteen feet, one dollar and fifty cents per foot.

The inward and outward rates shall be the same.

GLOUCESTER.

The rates of pilotage, for vessels liable to pay pilotage, bound into the harbor of Gloucester, shall be for vessels drawing less than twelve feet of water, one dollar per foot, for those drawing from twelve to fifteen feet

of water, inclusive, one dollar and thirty cents per foot, for those drawing more than fifteen feet, and not more than eighteen feet of water, two dollars per foot, for those drawing more than eighteen feet, and not more than twenty-one feet of water, two dollars and fifty cents per foot; for those drawing more than twenty-one feet, and not more than twenty-five feet of water, three dollars and fifty cents per foot, and no more. The harbor line shall be a line drawn from Norman's Woe to Dog Bar Buoy, off Eastern Point, within which line there shall be no compulsory inward pilotage. The pilots of Gloucester will be required to keep at least one decked boat, and said boat or boats shall be upon the cruising ground at all times when the weather will permit. The pilotage on vessels outward bound, shall be three fourths of the inward rates.

SALEM AND BEVERLY.

The pilots for the ports of Salem and Beverly, shall keep one or more good decked boats, and shall cruise for the purpose of bringing vessels into said ports, whenever the weather does not render it impracticable.

The harbor lines of the port of Salem and Beverly, shall be a line running north by east from Halfway Rock to the northern shore, and a line running north-westerly from Halfway Rock to Marblehead Fort, within which lines there shall be no compulsory inward pilotage. The rates for pilotage both for inward and outward bound vessels shall be as follows, namely: for vessels drawing less than nine feet of water, ninety-five cents per foot; for nine feet and less than eleven feet, one dollar and ten cents per foot; for eleven feet and less than thirteen feet, one dollar and thirty cents per foot; for thirteen feet and less than fifteen feet, one dollar and fifty cents per foot; for fifteen feet and less than seventeen feet, one dollar and seventy-five cents per foot; for seventeen feet and upwards, one dollar and ninety-five cents per foot.

Any Salem and Beverly pilot having brought a vessel in, shall have such vessel properly moored in the harbor, or secured at the wharf, at the option of master, within twelve hours after the arrival of said vessel, if the weather permits, without extra charge. But if called upon after the expiration of the twelve hours, to haul any vessel into the wharf, the pilot shall be entitled to receive two dollars for his services, and the same sum for taking a vessel from the wharf into the harbor, if said vessel shall not proceed to sea within twelve hours from the time of her being anchored in the harbor. The signal for the pilot boats for the ports of Salem and Beverly shall be their accustomed signal by day, namely: a red flag with a white P, and a black ball painted on the upper part of mainsail and jib, and by night a green light.

MARBLEHEAD.

The rates of pilotage for vessels liable to pay pilotage, bound into the harbor of Marblehead, shall be for vessels drawing from seven to eleven feet of water, sixty-seven cents per foot; from twelve to fourteen feet, ninety cents per foot; from fifteen to seventeen feet, one dollar and twenty cents per foot; eighteen feet and upwards, one dollar and sixty cents per foot.

The harbor limits of Marblehead shall be bounded by a line drawn from the south point of the Neck to Marblehead Rock, thence to Cat Island Rock, and thence westerly to Gerry's Island. Within this line there shall be no compulsory inward pilotage. The outward rates shall be the same as the inward.

TAUNTON RIVER.

The pilotage for Taunton River shall not be compulsory. When the services of a pilot are required, the rates of pilotage on all vessels piloted from Fall River to Somerset, drawing not over twenty feet of water, two dollars. From Fall River to Dighton, on vessels drawing twelve feet of water, seven dollars; eleven feet, six dollars and fifty cents; ten feet, six dollars; nine feet, five dollars and fifty cents; eight feet, five dollars; under eight feet, four dollars. From Somerset to Dighton and Berkley, fifty cents per foot for vessels drawing from eight to twelve feet of water; under eight feet, three dollars per vessel. The downward pilotage from the aforesaid places, shall be one half of the upward rates.

MERRIMACK RIVER AND HARBORS.

The pilotage on the Merrimack River, between Newburyport and Haverhill shall not be compulsory. When the services of a pilot are required, the rates of pilotage authorized by the commissioners shall be between Newburyport and ship yards at Bellville, thirty cents per foot; between Newburyport and Salisbury, fifty cents per foot; between Newburyport and Amesbury, sixty-two and one half cents per foot; between Newburyport and Groveland, eighty-seven and one half cents per foot; between Newburyport and Haverhill, one dollar per foot.

DORCHESTER AND NEPONSET.

The pilotage for the several landing-places in the towns of Dorchester and Neponset, shall not be compulsory. When the services of a pilot are required, and are offered outside of a line drawn from the wharf on Thompson's Island in a direct line to Dorchester Point, the rates of pilotage authorized by the commissioners shall be, namely, to Commercial

Point, thirty cents per foot; to Neponset, forty cents per foot. The inward and outward rates to be the same.

HINGHAM, WEYMOUTH, AND QUINCY.

The pilotage for the several landing-places in the towns of Hingham, Weymouth, and Quincy, below the bridges, shall not be compulsory. When the services of a pilot are required, and are offered outside of a line drawn from Nantasket Point to the east point of Pettick's Island, from thence a line drawn to the north-west point of said Pettick's Island, from thence in a line to Sunk Island, from Sunk Island in a direct line to Hangman's Island. The rates of pilotage authorized by the commissioners shall be, namely, to Hingham fifty cents per foot, for vessels drawing ten feet and under, eleven and twelve feet, sixty cents per foot. To Weymouth, or Braintree to Quincy Point, ten feet and under, fifty cents per foot; eleven and twelve feet, sixty cents per foot; thirteen feet, seventy-five cents per foot; fourteen feet, one dollar per foot; fifteen feet, one dollar and ten cents per foot; sixteen feet, one dollar and twenty-five cents per foot; to East Weymouth, ten feet and under, sixty cents per foot; eleven feet, sixty-five cents per foot; twelve feet, seventy cents per foot; thirteen feet, eighty-five cents per foot; fourteen feet, one dollar per foot; over fourteen feet, one dollar and twenty-five cents per foot. The inward and outward rates to be the same.

LYNN.

The pilotage for the harbor of Lynn, shall not be compulsory. When the services of a pilot are required, the rates of pilotage authorized by the commissioners shall be, namely: To Lynn, on vessels drawing twelve feet or less of water, three dollars per vessel; to West Lynn, three dollars per vessel. Up the river through bridges, four dollars per vessel. The outward rates shall be one half of said inward rates.

MYSTIC RIVER.

The pilotage for Mystic River shall not be compulsory. When the services of a pilot are required, the rates of pilotage authorized by the commissioners shall be, namely: From outside of Chelsea Bridge in Boston Harbor to Charlestown Neck or Malden Bridge, thirty-five cents per foot; to South Malden, fifty cents per foot; from Malden Bridge or either of the Railroad Bridges to Medford, Malden, or Edgeworth, five dollars per vessel. The upward and downward rates to be the same.

CHARLES RIVER.

The pilotage on the Charles River, from outside of Charlestown

bridge, in Boston harbor, shall not be compulsory. When the services of a pilot are required, the rates of pilotage authorized by the commissioners shall be,

From outside of Charlestown Bridge, in Boston Harbor to Fitchburg Railroad Wharf, namely:

10 feet and under	25 cents per foot.
11 to 13 feet	30 cents per foot.
14 feet and upwards	35 cents per foot.

To Landings within State Prison Bridge:

11 feet and under	40 cents per foot.

To Craigie's Bridge, including Lowell Railroad Wharves:

10 feet and under	35 cents per foot.
11 to 13 feet	40 cents per foot.
14 feet and upwards	45 cents per foot.

To Landings between Craigie's and Cambridge Bridges, including all Landings in Cambridgeport:

11 feet and under	40 cents per foot.

From Cambridge Bridge to Willard's Bridge, in addition to the above rates:

11 feet and under	60 cents per foot.

From Cambridge Bridge to Brighton Corner:

9 feet and under	$6 00 per vessel.
10 and 11 feet	75 cents per foot.
12 feet	80 cents per foot.
13 feet	85 cents per foot.

The upward and downward rates to be the same.

REGULATIONS FOR STATION BOATS IN BOSTON HARBOR.

At 12 M. Monday, December 13, 1858, the pilot boat No. 1 will take her station as prescribed by the regulations for the port of Boston, and remain on said station until Monday, the 20th of December, when pilot boat No. 2 will take said station. And each successive Monday, said station will be taken by the pilot boats in the order of their numbers.

The office of the commissioners is in the Tremont Bank building, 41 State street.

The commissioners will be in attendance from 9 until 2 o'clock each day.

Office open from 9 until 5 o'clock.

RULES AND REGULATIONS

FOR THE GOVERNMENT OF PILOTS.

REVISED AND ADOPTED BY THE BOARD OF SUPERVISING INSPECTORS, OCTOBER 17 1857; AND TO TAKE EFFECT FROM AND AFTER JANUARY 1, 1858.

In compliance with the provisions of the 29th section of Act of Congress, entitled "An Act to amend an Act entitled an Act to provide for the better security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam, and for other purposes," approved August 30, 1852.

ALL Pilots of Steamers navigating Seas, Gulfs, Lakes, Bays, or Rivers (except rivers emptying into the Gulf of Mexico, and their tributaries), when meeting or approaching each other, whether by day or by night, and as soon as within sight and fully within sound of the steam-whistle, shall observe and comply with the following

REGULATIONS.

RULE 1. When steamers meet "head and head," it shall be the duty of each to pass to the right or on the larboard side of the other. And either pilot, upon determining to pursue this course, shall give as a signal of his intention *one* short and distinct blast of his steam-whistle, which the other shall answer promptly by a similar blast of the whistle. But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting "head and head," or if the vessels are approaching in such a manner, that passing to the right (as above directed) is deemed unsafe, or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give *two* short and distinct blasts of his steam-whistle, which the other pilot shall answer promptly by *two* similar blasts of his whistle, and they shall pass to the left, or on the starboard side of each other. NOTE. — *In the night*, steamers will be considered meeting "head and head" so long as both the colored lights of each are in view of the other. *In the day*, a similar position will also be considered "head and head."

RULE 2. When steamers are approaching each other in an oblique

direction (as shown in diagram of fifth situation), they will pass to the right, as if meeting "head and head," and the signal by whistle shall be given and answered promptly, as in that case specified.

Rule 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given or answered erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

Rule 4. When steamers are running in a fog, or thick weather, it shall be the duty of the pilot to cause a *long* blast of the steam-whistle to be sounded at intervals not exceeding two minutes. And no steamer shall, in any case, be justified in coming into collision with another vessel if it be possible to avoid it.

Rule 5. Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by *one* long blast of the steam-whistle, which signal shall be answered by a similar blast given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered. But if the *first* alarm signal of such pilot be not answered, he is to consider the channel clear and govern himself accordingly.

Rule 6. The signals by blowing of the steam-whistle shall be given and answered by pilots in compliance with these rules, not only when meeting "head and head," or nearly so, but at all times, when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

N. B. The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves, — under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.

STEAMER'S LIGHTS, TO PREVENT COLLISION AT NIGHT.

RULE SEVENTH.

When under Weigh. All steamers rigged for carrying sail must carry a bright white light at the foremast head, and all other steamers must carry a bright white light on the *stem* or near the bow, and another on a mast near the stern, or on the flag-staff at the *stern*, the last-named being at an elevation of at least twenty feet above all other lights upon the steamer. All steamers must carry a green light upon the starboard side, and a red light on the port side.

NOTE. — Steamers, although rigged for carrying sail, instead of the foremast head light, may adopt the forward and stern lights provided for steamers *not* rigged for carrying sail; provided said lights are so arranged and placed on the vessel as to secure the contemplated objects.

When at Anchor. A bright white light at least twenty feet above the surface of the water. The lantern so constructed and placed as to show a good light all around the horizon.

FIRST. The masthead light of steamers rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the lantern to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the ship.

SECOND. The stem and stern lights of steamers not rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the respective lanterns to be so constructed that the stem light shall show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the ship, and that the stern light shall show a uniform light all around the horizon.

THIRD. The colored side lights to be visible at a distance of at least two miles in a clear dark night, and the lanterns to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely: from right ahead to two points abaft the beam on their respective sides.

FOURTH. The side lights are to be fitted with inboard screens of at least *six feet* in length (clear of the lantern), to prevent them from being seen across the bow. The screens to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith.

NOTE FIRST. The object of carrying the bright white light at the foremast head of steamers rigged for carrying sail is merely to intimate to other vessels the approach or presence of such steamer.

NOTE SECOND. The object of the colored lights required to be carried on *all* steamers is to indicate to other vessels the course or direction such steamers may be steering.

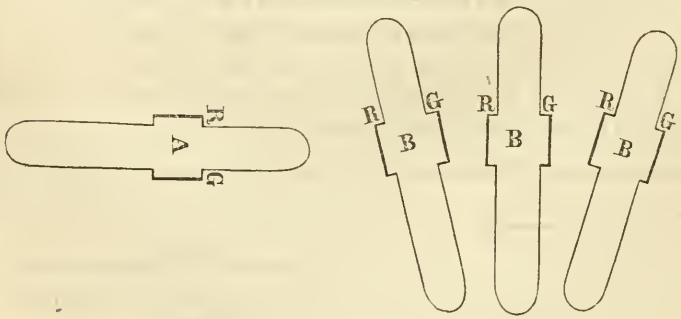
NOTE THIRD. The object of requiring steamers not rigged for carrying sail to carry a white stern light in connection with a white light on the stem or near the bow, is to provide (when the vessel's rig will admit of it) a method of determining, by a central range of lights, more correctly the course that such vessel is running.

DIAGRAMS.

The following diagrams are intended to illustrate the working of the above system of colored lights, and are to be used by pilots in connection with the rules, as sailing directions on meeting or nearing other steamers: —

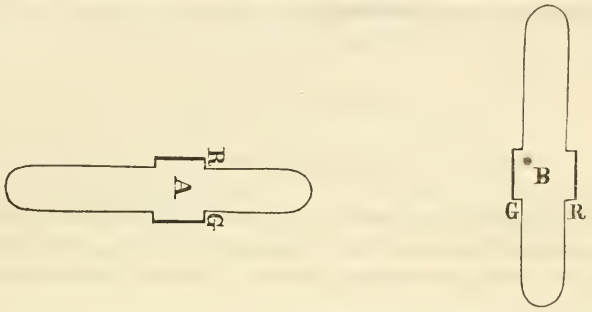
FIRST SITUATION.

In this situation the steamer A will only see the *red light* of the steamer B, in whichsoever of the three positions the latter may happen to be, because the *green light* will be hid from view. A will be assured that the larboard side of B is towards him, and that the latter is therefore crossing the bows of A *in some direction to port.* A will therefore (if so near as to fear collision) port his helm with confidence, and pass clear. On the other hand, the steamer B, in either of the three positions will see both the *red* and *green* lights of A, by which the former will know that a steamer is approaching *directly* towards him. B will act accordingly, and keep away if necessary.



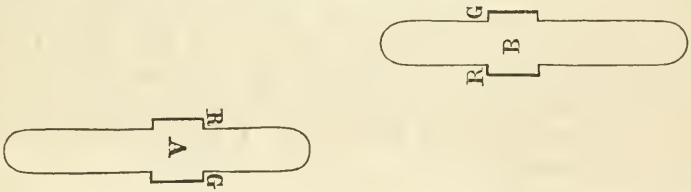
SECOND SITUATION.

Here A will see B's *green light* only, which will clearly indicate to the former that B is crossing to starboard. Again, both the colored lights of A being visible to B, will apprise the latter that a steamer is steering *directly* towards him. If necessary, A shall starboard his helm, and if so near as to fear collision, the boat shall be slowed and stopped.



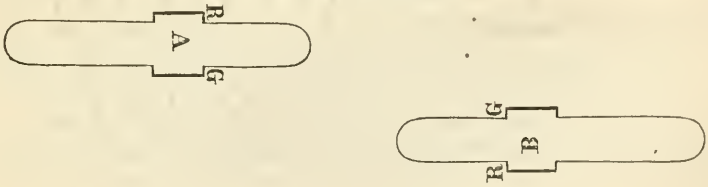
THIRD SITUATION.

A and B will see each other's *red light* only, the screens preventing the *green lights* from being seen. Both vessels are evidently passing to *port*, which is ruleable in this situation, each pilot having previously signified his intention by *one* blast of the steam-whistle.



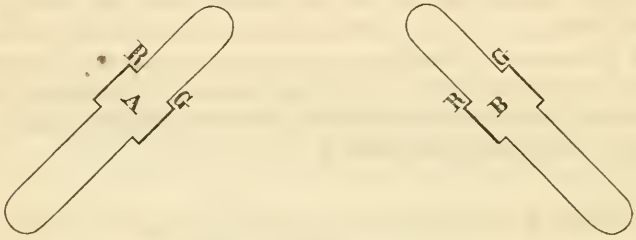
FOURTH SITUATION.

Here the *green* light only will be visible to each, the screens preventing the *red* light from being seen, they are therefore passing to *starboard*, which is ruleable in this situation, each pilot having previously signified his intention by *two* blasts of the steam-whistle.



FIFTH SITUATION.

This is a situation requiring great caution. The *red* light of B in view to A, and the *green* light of A in view to B, will inform both that they are approaching each other in an oblique direction. A should put his helm to *port*, according to the standing rule mentioned in the next, or sixth situation, and pass astern of B, while B should continue on his course, or keep away if necessary to avoid collision; each having previously given *one* blast of the steam-whistle, as required by the rule when passing to the right.



SIXTH SITUATION.

Here the *two* colored lights, visible to each, will indicate their *direct* approach ("head and head") towards each other. In this situation it is a *standing rule* that both shall put their helms to *port* and pass to the right, each having previously given *one* blast of the steam-whistle. But when, *for good reason*, a pilot finds it necessary to deviate from the *standing rule* just stated, he shall give early notice of such intention to the pilot of the other steamer by giving *two* blasts of the steam-whistle, and the pilot of the other vessel shall answer promptly with *two* blasts of his whistle, and both boats shall pass to the *left*, as shown in the fourth situation.

The manner of fixing the colored lights should be particularly attended to. They will require to be fitted, each, with a *screen* of wood or canvas, on the *inboard* side, and close to the light, in order to prevent *both* being seen at the same moment from any direction but that of *right-ahead*.

This is important, for without the *screens* any plan of bow lights would be ineffectual as a means of indicating the *direction of steering*.

This will be readily understood by a reference to the preceding illustrations, where it will appear evident, that in any situation in which two vessels may approach each other in the dark, the colored lights will instantly indicate to both the *relative course of each*, — that is, each will know whether the other is approaching directly, or crossing the bows, either to *starboard* or *port*.

This intimation, with the signals by whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night, with almost equal safety as in broad day, and for want of which so many lamentable accidents have occurred.

(It might prove of infinite service, combined with the above plan of steamers' lights, if all sailing vessels were provided with a *green* and *red lantern*, to be shown by hand on the starboard or port bow, according to the side on which the vessel might be approaching. *If at anchor*, all vessels without distinction should exhibit a *bright white light*, at least twenty feet above the surface of the water.)

Extract from Steamboat Act, approved August 30, 1852.

Section 29. Should any pilot, engineer, or master of any such vessel neglect or wilfully refuse to observe the foregoing regulations, any delinquent so neglecting or refusing, shall be liable to a penalty of thirty dollars and to all the damage done to any passenger or his person or baggage by such neglect or refusal, and no such vessel shall be justified in coming into collision with another, if it can be avoided.

Section 9. *Ninth Clause.* The license of any such engineer or pilot may be revoked upon proof of negligence, unskilfulness, or inattention to the duties of the station.

NOTE.

We had intended adding to this Appendix a number of the most important mercantile Forms; but have concluded to omit them in this volume for several reasons. One is, that we have thought it desirable to place in this Appendix a complete collection of all the statutes, and the principal rules made under statutory provisions, in the United States, in relation to commercial and maritime matters, as no such collection exists elsewhere, to our knowledge. And this has extended the Appendix so far as to leave no room for more in this volume.

Another reason is, that we have found that in all our commercial cities, most if not all of these forms are sold by stationers, and are thus made easily accessible to the profession (by mail, if necessary) almost everywhere.

We have therefore concluded to omit these Forms here. It will be necessary to give in the Appendix to the second volume some forms of process in Admiralty, which cannot readily be found elsewhere; and some other forms may there be added, and some advantage may thus be derived from placing all our Forms, whether of Contract or of Practice, together.

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